[redacted]

SUPREME COURT OF THE UNITED [redacted]

OCTOBER TERM, 1904.

No. 224.

[redacted] AND [redacted] EMPIRE [redacted] CO.,
PLAINTIFF IN ERROR,

vs.

MARY ELIZABETH WHITNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

FILED JUNE 30, 1904.

(28,763)

(23,763)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 206.

SPOKANE AND INLAND EMPIRE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MARY ELIZABETH WHITLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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1 In the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai.

MARY ELIZABETH WHITLEY, Plaintiff,
vs.
SPOKANE AND INLAND EMPIRE RAILROAD COMPANY, a Corporation, and JOSEPHINE WHITLEY, Defendants.

Complaint.

The above named plaintiff complains of the above named defendants, and for cause of action alleges:

I.

That the plaintiff now is and at all the times herein mentioned was a citizen and resident of the State of Texas, residing at Corsicana, Texas.

II.

That at all the times herein mentioned the defendant, The Spokane and Inland Empire Railroad Company, a corporation, was and yet is a railway corporation, duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Spokane, Washington.

III.

That on, to-wit: The 31st day of July, A. D. 1909, said defendant was and for a long time prior thereto had been and yet is the owner and in possession of that certain railroad laid out and constructed and extended from the City of Cœur d'Alene in the State of Idaho to the City of Spokane in the State of Washington heretofore known as the Cœur d'Alene and Spokane Railroad, together with all the
2 tracks, rolling stock and other appurtenances thereto belonging, and at all of said times was engaged in the business and occupation of operating said railroad and trains of cars propelled thereover by electricity for the purpose of transporting and conveying thereon passengers and freight for hire and compensation, as common carriers.

IV.

That the plaintiff is the mother and sole surviving parent and heir at law of A. P. Whitley, a married man of the age of 33 years, who up to the time of sustaining the injuries hereinafter mentioned, resided with his wife, Josephine Whitley, at Memphis, Tennessee. That at all times during his life up to the time he sustained said injuries, hereinafter set out, the said A. P. Whitley had been a strong, bright and healthy man, and in all ways and respects a companion and comfort to the plaintiff, and for a long time prior to sus-

taining said injuries had been engaged in the practice of law, and as an attorney at law was capable of earning and did earn large sums of money, which he contributed to this plaintiff for her maintenance and support, and would have continued to do so, thereby adding greatly to the welfare, comfort, and happiness of plaintiff, but for the careless and negligent acts of the defendant, The Spokane and Inland Empire Railroad Company, a corporation, hereinafter set out.

V.

That on, to-wit: the 31st day of July, A. D. 1909, at the City of Spokane in the State of Washington, defendant, the Spokane and Inland Empire Railroad Company, a corporation, in consideration of the fare charged and paid to it therefor, undertook and agreed as such common carrier to safely transport and convey said A. P. Whitley as a passenger, in its said train of cars, over its said railroad from the City of Spokane to the City of Cœur d'Alene and
3 return, and the said A. P. Whitley thereupon lawfully entered one of said passenger trains of said defendant to be so conveyed and was by defendant so transported and conveyed to the said City of Cœur d'Alene on said day; that thereafter, to-wit: on the day and year last aforesaid, at said City of Cœur d'Alene, said A. P. Whitley lawfully entered one of the passenger trains of defendant, The Spokane and Inland Empire Railroad Company, a corporation, on said railroad as such passenger, for the purpose of being by said defendant transported, conveyed and returned to said City of Spokane and thereupon said passenger train with said A. P. Whitley thereon, as such passenger, started upon its trip to said City of Spokane on said railroad, and when at a point in Kootenai County, State of Idaho, at or near what is known as La Crosse or Gibbs Station, a collision occurred by said train and another train of said defendant, the Spokane and Inland Empire Railroad Company, a corporation, then running upon defendants' said railroad, en route from said City of Spokane to said City of Cœur d'Alene, then and there running against and into each other, whereby said train upon which said A. P. Whitley was then and there being — was greatly smashed, broken and wrecked, and said A. P. Whitely was mangled and mortally wounded, of which injuries he, the said A. P. Whitley, died on the 31st day of July, A. D. 1909, at said County of Kootenai, State of Idaho.

VI.

That said collision and death of said A. P. Whitley were wholly caused by and through the careless and negligent operation and running of said trains by said defendant, the Spokane and Inland Empire Railroad Company, a corporation and its agents, servants, and employees in charge and control thereof and without any fault or negligence on the part of said A. P. Whitley or plaintiff.

4 VII.

That said A. P. Whitley was at the time he received the injuries hereinbefore set out and for a long time prior thereto had been fur-

nishing this plaintiff with money and means for her support and maintenance; that the plaintiff has no property and no money with which to support herself, and no other means of support and is in indigent circumstances.

VIII.

That Josephine Whitley, the above named defendant, is the widow of the said A. P. Whitley, and that there are no children as the issue of the marriage of said A. P. Whitley and Josephine Whitley. That the said A. P. Whitley left no children and that this plaintiff, the mother of said A. P. Whitley and Josephine Whitley, the widow of said A. P. Whitley, are the sole and only heirs at law of the said A. P. Whitley.

IX.

That Josephine Whitley is a necessary party plaintiff in this action, but has refused to join as plaintiff and is therefore made party defendant.

X.

That by reason of the death of the said A. P. Whitley, caused by and through the careless and negligent acts of the defendant, the Spokane and Inland Empire Railroad Company, a corporation, as aforesaid, and by reason of the facts herein alleged, plaintiff became and is deprived of the services, physical and mental labors and energies, comfort, happiness, society and companionship of said A. P. Whitley, and is thereby damaged in the sum of Twenty Five Thousand Dollars ($25,000.00).

Wherefore, plaintiff demands judgment against said defendant, the Spokane and Inland Empire Railroad Company, a corporation, for the said sum of Twenty Five Thousand Dollars ($25,-
5 000,00) together with her costs in this behalf laid out and expended.

ROBT. H. ELDER.

Duly verified.

Endorsed and Filed Oct. 25, 1909, at 11 o'clock A. M.

(Title of Court and Cause.)

Clerk's Entry of Default.

CLERK'S OFFICE,
Kootenai County, ss:

In this action the defendant Josephine E. Whitley, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint, on file herein and the time allowed by law for answering having expired the default of said defendant Jose-

phine E. Whitley, in the premises, is hereby duly entered according to law.

Attest my hand and the seal of said court, this 16th day of April, A. D. 1912.

D. E. DANBY, *Clerk*,
[COURT SEAL.] By EMIL ELDER, *Deputy Clerk*.

6 (Title of Court and Cause.)

Second Amended Answer of Spokane & Inland Empire Railroad Company.

Now comes the defendant, the Spokane & Inland Empire Railroad Company, and for its own separate second amended answer to plaintiff's complaint, states and alleges:

I.

That this defendant has no information or belief as to whether or not the plaintiff at all times mentioned in her complaint was or now is a citizen or resident of the State of Texas, residing at Corsicana, Texas, and therefore denies the same.

II.

Admits paragraphs two and three of plaintiff's complaint.

III.

Answering paragraph four of plaintiff's complaint this defendant alleges that it has no information or belief sufficient to enable it to answer said paragraph of plaintiff's complaint and therefore denies that the plaintiff is the mother or sole surviving parent, or the heir at law of A. P. Whitley, a married man of the age of 33 years, and for like reason defendant denies that at all or any time during his life, or up to the time he sustained the injuries alleged in plaintiff's complaint, or at any time whatever, the said A. P. Whitley had been or ever was in any way whatever, a companion or comfort to the plaintiff, and for like reason denies that he ever did contribute large sums, or any sums to the plaintiff for her maintenance or support, and denies that he would continue to do so, and denies that there was thereby added greatly, or at all, to the welfare, comfort or happiness of the plaintiff.

IV.

Answering paragraph six of the complaint of plaintiff, this defendant denies that the collision or the death of said A. P. Whitley was wholly, or at all, caused by or through the careless or
7 negligent operation or running of said trains, or either of them by this defendant.

V.

Answering paragraph seven of plaintiff's complaint this defendant alleges that it has not information or belief sufficient to enable it to answer said allegations, and therefore denies that A. P. Whitley, for a long time or any time prior to his alleged injuries, or death, had been or ever did, furnish the plaintiff with money or means for her support or maintenance, and for like reason defendant denies that the plaintiff has no money or property with which to support herself, or that she has no other means of support or that she is — indigent circumstances.

VI.

Answering paragraph eight this defendant alleges that it has no information or belief sufficient to enable it to answer the allegations of paragraph eight of plaintiff's complaint and therefore denies that the plaintiff is the mother of said A. P. Whitley or that she is an heir of said A. P. Whitley.

VII.

Answering paragraph ten of plaintiff's complaint this defendant denies that by reason of the alleged death of said A. P. Whitley alleged to have been caused through the careless and negligent acts of this defendant, or by reason of any of the facts alleged in plaintiff's complaint, plaintiff, became, or was, or is, deprived of the services, physical or mental labors or energies, or any services, labor of energies whatever, or comfort, or happiness, or society of companionship of said A. P. Whitley, and denies that the plaintiff is damaged in the sum of twenty five thousand ($25,000.00) Dollars, or any other sum whatever.

Further answering plaintiff's complaint and for an affirm-
8 ative defense to the matters and things therein alleged, defendant alleges and states:

I.

That on the 5th day of November, 1909, an action was duly instituted against it in the Superior Court of the State of Washington for Spokane County, by Josephine M. Whitley as the administratrix of the estate of A. P. Whitley, deceased, and on said date this defendant was duly served with process of said court and was duly required to appear and answer the complaint of the plaintiff and to defend therein. That said Superior Court of the County of Spokane in the State of Washington, is a court of record of said state having general jurisdiction and had jurisdiction of both parties to said action, and fully authorized under the statutes of said state to try and determine any and all issues relative thereto and to enter judgment therein, which said judgment was a full and final determination of the rights of the parties therein and to.

II.

That said Josephine M. Whitley, who brought said action against this defendant on the 5th day of November, 1909, commenced said action as administratrix of the estate of A. P. Whitley, deceased, and said Josephine M. Whitley who commenced said action is the same Josephine M. Whitley, alleged in the complaint of the plaintiff herein to be the wife of said A. P. Whitley, and who was made a party defendant in this action by the plaintiff herein. That the action so instituted by said Josephine M. Whitley against this defendant was brought for and on account of the death of said A. P. Whitley, and was brought for the same cause of action alleged and set forth in paragraphs two, three, five, and six of the complaint of plaintiff herein.

III.

That on the 5th day of November, 1909, said Superior
9 Court of the State of Washington for Spokane County duly acquired jurisdiction of the person of this defendant and of the subject matter of this action, and thereafter this defendant duly made answer in said cause, denying, among other things, the right of said plaintiff to maintain said action, and it further plead affirmatively the pendency of the action brought by this plaintiff, Mary Elizabeth Whitley, in this court, alleging that said Mary Elizabeth Whitley had instituted this action prior to the institution of the action of said Josephine M. Whitley, and it prayed therein that said action of Josephine M. Whitley be dismissed, or that if the court should refuse to dismiss the same, that then it should stay all proceedings until the dismissal of this action by this court.

IV.

That said Josephine M. Whitley in bringing said action against this defendant in the Superior Court of the State of Washington, for Spokane County, alleged and stated that she was the duly appointed, qualified and acting administratrix of the estate of A. P. Whitley, deceased, and as such had full and absolute right and authority to bring and maintain said action.

That thereafter such proceedings were had in said action of said Josephine M. Whitley, administratrix, against this defendant in the Superior Court of the State of Washington for Spokane County, that said cause came regularly on to be tried before the judge of said Superior Court, and after said trial was had and the evidence of the parties duly considered by the court, findings of fact and conclusions of law and judgment were duly rendered and entered in said cause against this defendant, a copy of which said findings and said judgment *are* hereto attached, marked respectively "Exhibit A" and "Exhibit B" and made a part of this second amended answer.

10 That said defendant, Josephine M. Whitley, in maintaining said action in said Superior Court of the State of Washington, for Spokane County, alleged and stated that she had full and absolute authority to bring and maintain said action and did

bring and maintain said action for and on behalf of herself and plaintiff herein, and all other heirs of said A. P. Whitley, whatsoever, and prosecuted said action for and on behalf of the plaintiff herein, as well as herself and all other heirs of said A. P. Whitley, deceased, and said action so prosecuted by said Josephine M. Whitley, as administratrix of the estate of said A. P. Whitley, deceased, was brought for and on behalf of said death under the statutes of Idaho, and Josephine M. Whitley claimed the right to recover damages for the death of said A. P. Whitley in accordance with the Statutes of the State of Idaho and for damages accrued by reason of the right given her under said statutes, and in her complaint alleged and stated that said action was brought in accordance with the right given by the statutes of the State of Idaho and the court so found that said action was so brought and prosecuted. This defendant alleges the fact to be that if the plaintiff herein ever had any right of action against it for damages whatever, that the same was fully adjudicated in said action brought by said Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, wherein said Josephine M. Whitley represented all of the heirs of said deceased and had full authority so to do, and particularly had authority to represent the plaintiff in this action and this defendant alleges the fact to be that in said action prosecuted by said Josephine M. Whitley as administratrix of the estate of A. P. Whitley, deceased, against this defendant for the death of said A. P. Whitley, a judgment was duly and regularly entered in said action after the court had acquired jurisdiction of both of the parties to said
11 action and the subject matter of said action, and said judgment, except as hereinafter alleged, still remains in full force and effect not appealed from, and is conclusive as between the parties to said action, and any and all parties whom said parties represented in said action.

V.

That after the recovery of said judgment as hereinbefore alleged and as shown by Exhibits A. and B. hereunto attached and made a part of this second amended answer, this defendant duly paid in full said judgment and said judgment was duly satisfied on the records of said court by the plaintiff Josephine M. Whitley administratrix of the estate of A. P. Whitley, deceased. This defendant alleges the fact to be, that the rendering of said judgment and the full payment thereof by this defendant is a full and complete bar to the maintenance of this action by the plaintiff and is a full and complete defense thereto, and this defendant demands judgment that full faith and credit be given to such judgment of the Superior Court of the State of Washington, for Spokane County. And defendant sets up Section 1 of Article IV of the Constitution of the United States, to-wit:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, * * *"

and especially relies thereon, and claims by virtue of said section of the Constitution of the United States and the aforesaid judgment, immunity from this suit.

Defendant alleges and charges the fact to be that said Josephine M. Whitley, its co-defendant, is not a resident of the State of Idaho and has never resided in the State of Idaho and that no jurisdiction ever has been acquired of her by this court, and said Josephine M. Whitley has given out and stated that she will not appear in this action and will not allow jurisdiction to be acquired of her by this court, and defendant charges the fact to be that this court has not jurisdiction of this action and cannot maintain the same, for the reason that both the interested and necessary parties to this action, before any judgment can be rendered herein cannot be obtained in this court.

Further answering plaintiff's complaint and for a second affirmative defense to the matters and things therein alleged, this defendant alleges:

I.

That prior to his death, the deceased mentioned in the complaint herein, was a citizen of the State of Tennessee and a resident of the County of Shelby in said State. That at the time of his death he still was such a resident and owned property in said county and state, subject to administration and distribution under the probate laws of Tennessee.

II.

That on his death, deceased left surviving him a widow, one Josephine M. Whitley. That he left no children. That prior to the 25th day of October, 1909, the probate court of said Shelby County, Tennessee, appointed the said Josephine M. Whitley as administrix of the estate of said A. P. Whitley, deceased, and that thereupon and before the commencement of this suit she duly qualified as such administratrix under the laws of the State of Tennessee and entered upon the discharge of her duties in that behalf.

III.

That said administratrix is the same person and the same administratrix who brought the suit in the Superior Court of the State of Washington, for the County of Spokane, and procured judgment therein and collected said judgment, as fully alleged in defendant's first affirmative defense pleaded in this action and the defendant herein repleads and re-alleges the matters and things alleged in said affirmative defense and prays that it may be taken as a part of this affirmative defense without being re-pleaded.

IV.

That after the collection of said money the plaintiff herein appeared in said probate court of Shelby County, Tennessee, and filed

a petition therein on the 16th day of February, 1910, praying that the bonds of the said Josephine M. Whitley as administratrix might be raised to the sum of Seventy five Hundred ($7500.00) Dollars, and alleging that said administratrix had collected eleven thousand dollars ($11,000) from this defendant, pursuant to authority theretofore received from the said probate court, to the end that the plaintiff herein as such petitioner therein, might be protected in the assertion of her right which she alleged she would do at a seasonable time. Thereafter, and on the 14th day of March, 1910, the plaintiff in this cause filed her further petition in said probate court wherein and whereby she alleged the filing of her original petition hereinbefore, averred a certain error therein, alleged that she was then a resident of the State of Texas and was the mother of the said deceased. That he was killed in a train wreck of the defendant in the State of Idaho on July 31st, 1909, alleging section 4100 of the Revised Codes of Idaho, alleging 5702, sub-division 2 of the Revised Codes of Idaho, and alleged that under the laws of the State of Idaho she was one of the heirs of the deceased and by virtue of the laws of Idaho was entitled to one half of any recovery of the damages growing out of the death of said deceased. Petitioner further alleged that the said Josephine M. Whitley as administratrix, appointed by the said probate court, had already recovered of the Railroad the sum of Eleven Thousand ($11,000) Dollars and that the said administratrix resisted and denied the said petitioner's claim to one half of the recovery. Prayed that the said administratrix might be required to appear and answer said petition and that as administratrix she might be required to execute a further bond in the sum of seventy five hundred ($7500.) Dollars and that upon the hearing
14 petitioner's right to one half might be declared and decreed, and prayed for such other and further general relief as the facts of the case might justify. Said petition was answered by the said Josephine M. Whitley as administratrix aforesaid, and an issue was reached touching all of the legal rights of the said petitioner, pa*l*intiff in this case. And thereafter such proceedings were had that on the 1st day of April, 1910, the said probate court entered its said judgment in said matter by which it was adjudged that the petitioner therein, plaintiff in this case, had no interest in the fund collected by the said Josephine M. Whitley as administratrix from the defendant company, but that the same belonged to the said Josephine M. Whitley as sole heir and distributee of the deceased, and ordering and adjudging that the petitions of the said petitioner, plaintiff in this case, be, and same were, dismissed, and that said Josephine M. Whitley as administratrix have and recover of the said Mary Elizabeth Whitley, plaintiff in this case, and her sureties, costs.

V.

Thereupon and thereafter such proceedings were had that said cause was appealed to the Supreme Court of the State of Tennessee, for the Western Division thereof, and thereafter and on the 14th day of July, 1912, the said Supreme Court of the State of Tennessee

made and entered its judgment in said cause, wherein and whereby it was adjudged that there was no error in the said judgment of the said probate court of Srelby County, State of Tennessee, and that it was properly adjudged in said court that Josephine M. Whitley, as widow of the deceased, is alone entitled to the said Eleven Thousand Dollars, theretofore received by her as administratrix in the settlement of the claim and judgment against the Spokane & Inland Empire Railroad Company for the wrongful death of her said husband,
and that said fund was to be distributed in accordance with
15 the laws of the State of Tennessee and not the laws of the
State of Idaho, and that the petitioner therein, plaintiff, herein, as mother of the deceased, had no interest of any kind in said fund and no right to any part of the proceeds of the recovery for the death of the deceased, and further adjudging that the judgment of the said probate court of said Shelby County, Tennessee, be and the same was in all respects affirmed and that the appellee recover as administratrix, of the appellant and her sureties, costs.

VI.

This defendant specially sets up and relies upon the aforesaid judgment pleaded as aforesaid and specially sets up and relies upon Section 1 of Article IV of the Consittution of the United States, which read- as follows:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State * * *."

And alleges that said judgment and the said Section 1 of Article IV of the Constitution of the United States is a defense to this action.

VII.

That defendant likewise alleges that independently of the constitutional provision herein specifically set up and relied upon, the matter and things in this action pleaded are a defense to this action.

Wherefore defendant prays judgment that full faith and credit be given to the judgment in this action pleaded against it in the Superior Court of the State of Washington, in and for Spokane County, and that full faith and credit be given to the judgment heretofore rendered by the probate court of Shelby County, Tennessee, and by the Supreme Court of Tennessee, pleaded in this action, and that this action may be dismissed and this defendant go hence without day and recover its costs and disbursements herein ex-
pended.
16

WHITLA & NELSON,
Residence and Post-office Address, Cœur d'Alene, Idaho;
GRAVES, KIZER & GRAVES,
Residence and Post-office Address, Spokane, Washington,
Attorneys for Defendant, Spokane & Inland Empire Railroad Company.

Duly verified.

17 EXHIBIT A.

In the Superior Court of the State of Washington for Spokane County.

JOSEPHINE M. WHITLEY, Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Findings of Fact and Conclusions of Law.

The above entitled cause came on regularly for trial on this date before the court without a jury, both plaintiff and defendant appearing herein by their respective counsel, and the court having heard the evidence adduced by the respective parties hereto, does now make the following:

Findings of Fact.

I.

Plaintiff Josephine M. Whitley is and for some time prior to the commencement of this action has been the duly qualified and acting administratrix of the estate of A. P. Whitley, deceased, *and* having been appointed as such administratrix in the Probate Court of Shelby County, State of Tennessee, in which said County, her decedent, A. P. Whitley, had his domicile at the time of his death, and in which said county the said A. P. Whitley left estate subject to distribution, and said Probate Court of Shelby County, Tennessee is the court under the laws of the State of Tennessee which had jurisdiction to make appointment to such administratrix.

II.

Defendant is an electric railway corporation duly organized and existing under the laws of the State of Washington, with its
18 principal place of business in the city of Spokane, and it owns and operates an electric railway system between the City of Spokane, Washington and Cœur d'Alene, Idaho, and in the operation of such electric railway is a common carrier for hire of passengers and freight.

III.

On this 31st day of July, 1909, plaintiff's decedent A. P. Whitley while a passenger on one of the electric railway trains of the defendant was mortally injured and shortly thereafter died as the result of a collision between two of defendant's electric railway trains at or near Gibbs, Idaho, on one of which said A. P. Whitley was then and there a passenger, and said A. P. Whitley's death was caused by

the negligent operation of said electric trains by defendant. There was no negligent act or omission on the part of the said A. P. Whitley which in any wise contributed to the causing of his death, and by reason thereof the defendant, Spokane & Inland Empire Railroad Company, became and is liable to the plaintiff for all damages accruing to the heirs of said A. P. Whitley. At the time of his death, said A. P. Whitley was a lawyer engaged in the active practice of his profession at Memphis, Tennessee. He was of the age of about thirty four years. He had been married but a short time and left no children. In view of his age his earning capacity and his station in life, the court deems the sum of Eleven Thousand ($11,000) Dollars to be a just and adequate compensation to be awarded to the heirs and estate of A. P. Whitley, deceased, and a judgment for that amount in favor of the plaintiff will be full compensation for the death of the said A. P. Whitley.

IV.

Said A. P. Whitley was not a resident of the State of Idaho, and at no time left any estate, therein, but at the time of his death
19 and for a long time prior thereto had been a resident of Shelby County, Tennessee, where he left estate subject to distribution. Plaintiff is and at all times herein mentioned, was the wife of said A. P. Whitley, deceased. The laws of the State of Idaho, where said A. P. Whitley, met his death, prescribe as follows: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death" and by virtue thereof the plaintiff herein is entitled to institute this proceeding against defendant to recover the amount due for the death of the said A. P. Whitley.

V.

Shortly after the death of the said A. P. Whitley the plaintiff herein presented a claim for damages for the death of A. P. Whitley to the defendant herein, and thereafter, to-wit: on the 14th day of September, 1909, said defendant agreed to pay to the plaintiff the sum of Eleven Thousand Dollars ($11,000) as full compensation to the estate and heirs of A. P. Whitley, deceased, for the death of said A. P. Whitley, caused by the negligence of the defendant, and at said time above referred to, the plaintiff believed that said amount so offered was full, fair and adequate settlement for the death of the said A. P. Whitley and desiring to avoid costs and expenses incident to a suit against said defendant, agreed to accept such amount as such administratrix as full compensation to said estate and the heirs of A. P. Whitley. Thereupon all of the facts and circumstances concerning the death of A. P. Whitley were fully disclosed to the Probate Court of Shelby County, Tennessee, and said court was prayed by the plaintiff for an order authorizing her to make such settlement. Thereupon said court having jurisdiction, of the said matter, upon considering said application, duly authorized and em-

powered plaintiff herein to accept and receive the said sum
20 of eleven thousand ($11,000.00) Dollars, in full settlement of all claims of the estate and heirs of A. P. Whitley against said defendant. Thereupon the plaintiff and defendant ratified said agreement theretofore made by them, and the defendant company paid to the plaintiff the sum of fifteen hundred dollars ($1500.00) as part payment of the said sum of eleven thousand dollars ($11,000.00) agreed to be paid by it as aforesaid, and the said plaintiff, at all times since the entry of said order in the Probate Court of Tennessee has been duly authorized and empowered and is now duly entitled to receive the balance of said sum of Eleven Thousand Dollars.

VI.

Subsequently to the entry of said order in the Probate Court of Shelby County, Tennessee, authorizing said settlement, and subsequent to the ratification thereof by the plaintiff and defendant, and subsequent to the payment of said sum of fifteen hundred dollars, on to-wit: the 25th day of October, 1909, one Mary Elizabeth Whitley, duly instituted suit against this defendant and against Josephine Whitley in the District Court of the Eighth Judicial District of the State of Idaho, for Kootenai County. Said Mary Elizabeth Whitley instituted said suit as one of the heirs of said A. P. Whitley deceased, joining Josephine Whitley for the reason that she is the other heir of A. P. Whitley and alleging that she refused to join in said suit as a party plaintiff. Said suit so instituted by Mary Elizabeth Whitley is for the same cause of action as the one settled by the agreement of the parties hereto prior to the institution of said action.

From the foregoing Findings of Fact the Court now makes the following:

Conclusions of Law.

The institution of the suit in the courts of Idaho against the defendant Spokane & Inland Empire Railway Company by
21 Mary Elizabeth Whitley as one of the heirs of A. P. Whitley, deceased, in which said suit the other of the heirs is made party defendant, is not a defense to this action, nor does it entitle the defendant to have the prosecution of this suit on behalf of the plaintiff stayed until a determination of the Idaho action. Plaintiff is entitled to judgment against the defendant for the remainder of the amount due her as administratrix of the estate of A. P. Whitley, to-wit: Nine Thousand Five Hundred ($9,500.00) Dollars, together with her costs.

Done in open court this 18th day of November, 1909.

J. D. HINKLE, *Judge.*

22 EXHIBIT B.

In the Superior Court of the State of Washington for Spokane County.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Judgment.

This matter coming on regularly for hearing this 18th day of November, 1909, and the plaintiff herein appearing by Messrs. Hamblen & Gilbert, her attorneys, and the defendant herein appearing by Messrs. Graves Kizer & Graves, its attorneys, and the cause having been tried by the court without jury, and the court having made findings of fact and conclusions of law herein, and being duly advised in the premises, now therefore, upon a- because of said findings of fact and conclusions of law,

It is ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant herein the sum of nine thousand five hundred dollars ($9,500.00) together with her costs and disbursements herein.

Done in open court this 18th day of November, 1909.

J. D. HINKLE, *Judge.*

Service of the within Second Amended Answer is hereby acknowledged this 8th day of August, 1912.

JOHN P. GRAY,
Attorney for Plaintiff.

Endorsed and Filed Aug. 8, 1912.

23 (Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

This cause came on to be heard before the judge of the above entitled court, sitting without a jury, on the 9th day of September, 1912, the parties thereto having in open District Court consented to the trial of said cause at said time, and having in open district court waived a jury trial herein; the plaintiff being represented by Messrs. Elder & Elder and John P. Gray, and the defendant, Spokane & Inland Empire Railroad Company, a corporation, being represented by F. H. Graves and Whitla & Nelson, the defendant Josephine Whitley appearing not, oral and documentary evidence was introduced by the parties, both parties closed their case, thereupon the case was argued and by the court taken under advisement and thereafter the court having fully considered the pleadings and evi-

dence, and being fully advised in the premises, announced that he would find for the plaintiff and now makes the following findings of fact:

Findings of Fact.

I.

The court finds that the plaintiff is now and at all of the times mentioned in the complaint was a citizen and resident of the State of Texas, residing at Corsicana, Texas.

II.

That the defendant, the Spokane & Inland Empire Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Spokane, Washington.

III.

That on the 31st day of July, 1909, the defendant Spokane & Inland Empire Railroad Company, was and for a long time prior thereto, had been and still is the owner and in the
24 possession of a certain line of railroad extending from the City of Cœur d'Alene, Idaho, to the city of Spokane, Washington, and that at all of said times was engaged in operating said railroad and cars propelled thereover by electricity for the purpose of transporting passengers and freight for hire and compensation as common carriers.

IV.

That on the 31st day of July, 1909, the defendant Spokane & Inland Empire Railroad Company, accepted one A. P. Whitley as a passenger on one of its train of cars on its line of railroad from the City of Spokane to the City of Cœur d'Alene and return; said A. P. Whitley bought and paid for a round-trip ticket upon said railroad and was conveyed by the defendant in one of its passenger trains to the City of Cœur d'Alene. That thereafter on the same day said A. P. Whitley became a passenger upon one of the passenger trains of the defendant for the purpose of returning to the City of Spokane. That the said A. P. Whitley had proceed- upon the said return trip when at a point at or near what is known as La Cross or Gibbs station, in the County of Kootenai, State of Idaho, a collision occurred between the said train upon which the said A. P. Whitley was a passenger and another train of the defendant railroad company, then running upon the defendant's railroad, as a result of which collission the train upon which the said A. P. Whitley was a passenger was broken and wrecked and A. P. Whitley was mortally wounded and injured, of which said injuries and wounds the said A. P. Whitley died on the 31st day of July, 1909, in the said County of Kootenai, State of Idaho.

V.

That the said defendant has admitted in open court that because of the facts surrounding the injury and death of the said A. P. Whitley, that the company became liable for the death of the said A. P. Whitley, and the court finds that the death of the said
25 A. P. Whitley was caused by and through carelessness and negligent running of the train of the defendant railroad company and its servants, agents and employes without cause or fault upon the part of the said A. P. Whitley.

VI.

That the said A. P. Whitley was at the time of receiving the said injuries and at the time of his death, a man of the age of thirty-four years, a lawyer by profession.

VII.

That the plaintiff is the mother of the said A. P. Whitley deceased, and that the said plaintiff has no property and no money with which to support herself, and no means of support and is in indigent circumstances, and was at the time of the injury and death of the said A. P. Whitley, dependent upon her children for support. That the said A. P. Whitley at the time of receiving the injuries which resulted in his death and for a long time prior thereto had been furnishing the plaintiff with money and means for her support and maintenance, and was her main dependence for support.

VIII.

That the defendant, Josephine Whitley, is the widow of the said A. P. Whitley, deceased, and that there were at the time of the death of the said A. P. Whitley, and now are no living children as an issue of the marriage of A. P. Whitley and Josephine Whitley, and that the said A. P. Whitley left no children and that this plaintiff, the mother, and the said Josephine Whitley the widow, of the said A. P. Whitley were at the time of his death, and now are the sole and only heirs at law of the said A. P. Whitley.

IX.

That the said Josephine Whitley refused to join with the
26 plaintiff as a party to this action, although requested by the plaintiff, and was for that reason made a party defendant. That the said Josephine Whitley has given out and stated that she will not appear in this action, and will not allow jurisdiction to be required of her in this court; that the said Josephine Whitley has been notified by the plaintiff of the pendency of this action and a copy of the complaint and summons herein, upon order of this court, has been personally served upon her at the City of Spokane, Washington, on the 4th day of March, 1912.

X.

The court further finds that this action was commenced by the filing of this complaint on the 25th day of October, 1909 and that the complaint and summons herein were served upon the defendant railroad company on the 25th day of October, 1909.

XI.

That on the 14th day of September, 1909, the defendant railroad company entered into an agreement with Josephine Whitley agreeing to pay the said Josephine Whitley Eleven Thousand Dollars ($11,000.00) for and on account of the death of the said A. P. Whitley, and the said railroad company at that time paid the said Josephine Whitley Fifteen Hundred Dollars ($1,500.) in money; that the said railroad company thereupon had an understanding with the said Josephine Whitley that she should apply for letters of administration upon the estate of A. P. Whitley in the State of Tennessee, and that upon producing proof of her appointment, the balance thereof would be paid. The court finds that the said Josephine Whitley had not been appointed administratrix of the estate of A. P. Whitley, deceased, at the time she entered into the agreement with the defendant company to accept $11,000. as a settlement for the death of said A. P. Whitley.

XII.

The court further finds that Josephine Whitley applied
27 for letters of administration upon the estate of A. P. Whitley deceased in Shelby County, Tennessee, and was appointed administratrix of his estate on the 2nd day of October, 1909; that thereafter the said Josephine Whitley applied to the said court for permission as administratrix to make settlement with the defendant railroad company, and the court, deeming it for the best interest of the estate to make such settlement, directed that she might make the settlement for the sum of $11,000. That thereafter the present action having been commenced, the defendant railroad company refused to carry out with Josephine Whitley, as administratrix, the agreement made by it with the said Josephine Whitley as as individual. That thereafter the said Josephine Whitley commenced in the Superior Court of Spokane County, Washington, a suit as administratrix of the estate of said A. P. Whitley, deceased, under the Tennessee appointment against the defendant company, and the defendant by its answer set up the pendency of this action, and in its answer alleged as follows:

"This defedant further alleges that Mary Elizabeth Whitley is, under and by virtue of the laws of the State of Idaho, where the plantiff's cause of action arose, one of the heirs of said A. P. Whitley, deceased, and this defendant further alleges that said Mary Elizabeth Whitley, as such heir, is entitled to maintain said suit against this defendant.

This defendant further says that if the plaintiff in this action is permitted to recover full compensation, or any compensation in this

action, on behalf of the estate of A. P. Whitley, defendant will be subject to the payment of full compensation to the heirs of said A. P. Whitley, deceased, a second time in the action brought by the said Mary Elizabeth Whitley in the said District Court of the Eighth Judicial District of the State of Idaho, in and for the County
28 of Kootenai, inasmuch as said action in the courts of Idaho was instituted prior to the institution of this action and the courts of the State of Idaho will refuse to stay proceedings or to dismiss said action on account of the bringing of this action."

The complaint in said action in Spokane was filed on the 18th day of November, 1909. The answer in said suit was filed on the same day, and a reply was also filed on the same day. Thereupon the cause was tried without a jury before the court; the cause was not contested, findings of fact and conclusions of law and judgment were prepared and presented at that time, and on the said 18th day of November, 1909, a judgment was entered in favor of Josephine Whitley, as administratrix of the estate of A. P. Whitley, deceased, for the sum of $9,500. The court further finds that Josephine Whitley was not appointed administratrix of the estate of A. P. Whitley in the State of Washington and sued only under her appointment in Tennessee.

XIII.

That the said Josephine Whitley in her complaint in the State of Washington alleged that she was bringing her action under the death statute of the State of Idaho, and alleged in her complaint that she was the wife of the said A. P. Whitley and did not disclose therein whether there were any other heirs of the said A. P. Whitley, and the said defendant railroad company knowing that the mother of A. P. Whitley was an heir, did not require the said Josephine Whitley in her complaint to set forth who the heirs of the said A. P. Whitley were or for whose benefit the said action was being maintained. The court further finds that the railroad company did know at the time it pleaded to the said complaint of Josephine Whitley as administratrix in the suit in Spokane County, Washington that the mother of the deceased, the plaintiff in this case, claimed to be an heir and claimed to be entitled to compensation for the death of said A. P. Whitley. That the said railroad company did not in any way advise either the plaintiff in
29 this action or any one representing her of the commencement of the said action in Spokane County, Washington, nor was any notice whatever given to plaintiff in this action by the said railroad company of the said suit so commenced in the State of Washington.

XIV.

The court further finds, that immediately upon the entry of the said judgment in the Superior Court of Spokane so entered by consent, the defendant railroad company paid over to Josephine Whitley the sum of $9,500, and that the said Josephine Whitley removed the same to the State of Tennessee. That the plaintiff in this case, the mother of said A. P. Whitley filed a petition in the Probate Court of Tennessee praying that her heirship be recognized, and

that Josephine Whitley be required to pay to her one-half of the money received from the said railroad company on account of the death of the said A. P. Whitley. That the courts in Tennessee refused to recognize the law and public policy of the State of Idaho, although the death occurred in the State of Idaho, and the recovery was had under the laws of the State of Idaho.

XV.

The court finds that the sum of Five Thousand Five Hundred Dollars ($5,500) is a just and proper sum to be awarded to the plaintiff for and on account of the death of her son, A. P. Whitley, and that the plaintiff by reason of the death of the said A. P. Whitley is entitled to recover of and from the said defendant the sum of Five Thousand Five Hundred Dollars ($5,500) in compensation therefor.

XVI.

The court further finds that the plaintiff is entitled to have and recover her costs sustained in this action taxed at the sum of
30 $—.

From the foregoing findings of fact, the court makes the following conclusions of law.

Conclusions of Law.

I.

The court finds that any such distribution as was attempted by the courts of Tennessee was contrary to the laws of the State of Idaho, and contrary to the public policy of the State of Idaho, and that under the laws of the State of Idaho any recovery to be a bar must be for the benefit of the heirs designated by the Idaho statutes.

II.

The court finds that the judgment entered into in Spokane upon consent and agreement between the said Josephine Whitley and the said railroad company, defendant, is not a bar to the prosecution of this action.

III.

The court finds that the judgment in Tennessee is not a bar to the maintenance of this action.

IV.

The court finds that by attempting to secure one-half of the sum paid Josephine Whitley, the plaintiff in this action did not take a position inconsistent to her present position and is not barred or estopped from maintaining this action.

V.

That the plaintiff is entitled to the judgment of this court against the defendant, Spokane & Inland Empire Railroad Company, a corporation for the sum of Five Thousand Five Hundred Dollars ($5,500) together with her costs and disbursements to be hereafter taxed.

31 Done at Cœur d'Alene, Idaho, this 28th day of October, 1912.

R. N. DUNN, *Judge.*

Endorsed and Filed Oct. 28, 1912.

32–35 (Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial before the court sitting without jury, at Cœur d'Alene, Idaho on the 9th day of September, 1912, the plaintiff being represented by Messrs. Elder & Elder, and John P. Gray, and the defendant being represented by Messrs. F. H. Graves and Whitla & Nelson, and evidence having been offered by both plaintiff and defendant, and the cause having been argued and submitted to the court, and the parties in open court having theretofore agreed and stipulated that the said cause should be tried at Chambers by the Judge of the above entitled court, sitting without jury, a jury having been expressly waived, and the court having taken the said cause under advisement, and having thereafter and heretofore announced its conclusions herein and having heretofore made its findings of facts and conclusions of law, awarding judgment to the plaintiff in the sum of Five thousand five hundred dollars ($5,500.)

Now Therefore, It is ordered, adjudged and decreed that the plaintiff have and recover from the defendant, Spokane & Inland Empire Railroad Company, a corporation, the sum of Five thousand five hundred dollars ($5,500.) together with her costs and disbursements, taxed at the sum of — dollars.

Done at Cœur d'Alene, Idaho, this 28th day of October, 1912.

R. N. DUNN, *Judge.*

Endorsed and Filed October 28, 1912.

* * * * * * *

36 (Title of Court and Cause.)

Notice of Motion for New Trial.

To the Above Named Plaintiff, Mary Elizabeth Whitley, and to Elder & Elder and John P. Gray, Your Attorneys:

Please take notice that the defendant, the Spokane & Inland Empire Railroad Company, a corporation, intends to move for a new trial herein from that certain judgment made in this action on

the 28th day of October, 1912, in favor of the plaintiff, Mary Elizabeth Whitley, and against this defendant, wherein the said Mary Elizabeth Whitley was granted judgment for the sum of $5,500.00 together with costs and disbursements to be taxed in said action. Said motion will be made upon the records and files of this action, together with the minutes of the court and transcript of the stenographer's record.

The grounds upon which said motion will be made are:

1st. Error of the court in proceeding to try said action without the necessary and proper parties having been served and before said court.

2nd. That the court had no jurisdiction to proceed to hear and determine said action, in this:

(*a*) That the records of this action show that Josephine M. Whitley, one of the above named defendants, is one of the heirs at law of A. P. Whitley, deceased, for the death of whom this action is brought, and as such has not been brought into this court by any service whatever, and has never appeared or taken any part therein, and this court has no jurisdiction of this action, and without all the heirs being before the court it had no jurisdiction to proceed to hear and determine said action.

(*b*) That defendant has plead a written judgment and decree entered by a court of original jurisdiction in a sister state,
37 which said judgment and decree is entitled to full faith and credit in this state, and which written instrument stands admitted by plaintiff and which said written instrument, judgment and decree is a complete bar to this action.

3rd. Insufficiency of the evidence to justify the decision of the court, and the defendant particularly specifies the grounds of insufficiency of said evidence *of said evidence* as follows, to-wit:

1st. That no evidence has been introduced in this action by the plaintiff showing that she was damaged by the death of A. P. Whitley in the sum of $5,500.00 or any other sum whatever.

2nd. That the evidence introduced on behalf of the plaintiff shows that there are other heirs besides herself, namely Josephine M. Whitley, who has never been properly brought before this court and by reason thereof the plaintiff is not entitled to recover as this action is not prosecuted for or on behalf of herself, but is prosecuted by plaintiff as one of the heirs for and on her own behalf.

3rd. That the evidence introduced in this action shows that Josephine M. Whitley as administratrix of the estate of A. P. Whitley, deceased, duly and regularly appointed by the Probate Court of Shelby County, Tennessee, in which said state and county deceased was a resident at the time of his death, brought an action in the Superior Court of Spokane County, State of Washington, which is a court of general jurisdiction, and which said court obtained jurisdiction of said action, and that thereafter in said action a judgment was duly entered, rendered, made and given in favor of said Josephine M. Whitley as administratrix and against this defendant in full and complete satisfaction of the identical cause of action upon which this action is based, and said Josephine M. Whitley, as such

administratrix had full right and authority to bring and
38 maintain said action and said judgment so rendered therein is a complete bar to the prosecution of this action.

4th. That plaintiff in this action knew of said judgment in said Superior Court of Spokane County, Washington, within a few days after the entry thereof and thereafter made claim to her portion of the amount recovered under said judgment and prosecuted an action in the courts of Tennessee for the recovery from said Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased of her share of the money received by the said administratrix in payment of said judgment for the death of said A. P. Whitley, upon which this cause of action is based, and said courts of Tennessee obtained jurisdiction of the parties thereto and did adjudge and decree that said plaintiff was not entitled to said judgment recovered or any part thereof, which said judgment and decree was affirmed by the Supreme Court of the State of Tennessee and has become and is a final binding and conclusive judgment between the parties thereto, and said judgment and decree showed an election upon the part of the plaintiff to treat said money as belonging in part to her and is inconsistent with the prosecution of this action.

5th. That the action prosecuted by Josephine M. Whitley as administratrix in the Superior Court of Spokane County, Washington, and in which action judgment was rendered in favor of Josephine M. Whitley and against this defendant upon the identical cause of action sued on herein, was brought by Josephine M. Whitley as such administratrix for and on behalf of all the heirs of said A. P. Whitley deceased, and this defendant duly paid said judgment, and the same was satisfied in full upon the records of said court by said Josephine M. Whitley as administratrix of the estate of A. P. Whitley, deceased.

6th. That this court has not given full faith and credit to the public acts and judicial proceedings of the State of Washington.

39 7th. That this court has not given full faith and credit to the public acts and records and judicial proceedings of the State of Tennessee.

8th. That the evidence in this action shows that plaintiff is not entitled to recover from this defendant upon the cause of action sued on herein and that the cause of action sued on has been fully, finally and completely determined between this defendant and the administratrix of the estate of A. P. Whitley, deceased, and plaintiff herein does not have any right or any cause of action against this defendant on account of the death of said A. P. Whitley whatever.

9th. The court erred in making finding of fact No. 11 wherein it was found that said settlement was not made with Josephine Whitley as administratrix, but that the same was made with Josephine Whitley as an individual for the reason that the same is not sustained by the evidence but is contrary thereto.

10th. The court erred in making finding of fact No. 13 wherein it was found that the defendant railroad company did not require said Josephine Whitley in her complaint in the court of Spokane

County, Washington, to set forth who the heirs of A. P. Whitley were or for whose benefit the said action was being maintained, or that the railroad company did not advise the plaintiff herein of the commencement of said action, for the reason that the same was not an issue in this case and was immaterial and is not substantiated by any evidence whatever introduced in this action.

11th. The court erred in making finding of fact No. 14 and that part thereof wherein it was found that the courts of Tennessee refused to recognize the law and public policy of the State of Idaho, although the death upon which recovery was made occurred in the State of Idaho, for the reason that the same is incompetent,
40 irrelevant and immaterial and not an issue in this action and not substantiated by any evidence introduced.

12th. The court erred in making finding of fact No. 15 wherein it was found that the sum of $5,500.00 was a just and proper sum to be awarded to the plaintiff on account of the death of her son and that plaintiff was entitled to recover said sum in compensation therefor, for the reason that the same was not brought out or substantiated by the evidence and no evidence whatever was introduced showing that plaintiff was entitled to recover said sum or any sum whatever, and said finding of fact and the amount therein stated to be due the plaintiff is excessive.

13th. The court erred in making finding of fact No. 16 wherein it found that plaintiff was entitled to recover her costs in said action.

14th. The court erred in rendering any finding of fact herein whatever in favor of the plaintiff and against the defendant.

15th. The court erred making conclusion of law No. 1 upon said findings of fact for the reason that the same is not the law and is not borne out by any testimony introduced in said action and is not substantiated by the record in the action and is erroneous.

16th. The court erred in making conclusion of law No. 2 for the reason that said conclusion of law is erroneous and that the judgment entered in the Superior Court of Spokane County, Washington, on the action prosecuted by Josephine Whitley as administratrix, against this defendant was and is a complete bar to the prosecution of this action in that said Josephine Whitley as administratrix appointed under the laws and by the court of the State of Tennessee, had full power and authority to prosecute an action as such admin-
41 istratrix for the wrongful death of decedent in the courts of the State of Washington, and the courts of the State of Washington held, decided and determined that she did have such authority, and said decision of the Superior Court of the State of Washington has never been reversed, revoked or annulled and is entitled to full faith and credit in the courts of this state.

17th. The court erred in making conclusion of law No. 3 for the reason that the judgment entered in the courts of Tennessee and plead by the defendant is a complete bar to the maintenance of this action, in that the record shows that said plaintiff treated the action as prosecuted by said Josephine M. Whitley as brought for and on her behalf as one of the heirs of said decedent and elected to so consider the same and prosecute her action against said Josephine M.

Whitley in the court of Tennessee to recover her portion thereof, and the courts of Tennessee held adversely to said plaintiff's contention, which said judgment has been affirmed by the Supreme Court of the State of Tennessee and is now in full force and effect and is entitled to full faith and credit in the courts of this state.

18th. The court erred in making conclusion of law No. 4 for the reason that in attempting to secure one-half of the sum recovered by said Josephine M. Whitley as administratrix plaintiff in this action did take a position inconsistent with her present position and by reason thereof is estopped and debarred from maintaining this action, and said conclusion is not consistent with the evidence introduced in this action.

19th. The court erred in making conclusion of law No. 5 for the reason that said conclusion is not substantiated by the evidence in this action and plaintiff, Mary Elizabeth Whitley is not entitled to judgment in the sum of $5,500.00 or any other sum whatever against this defendant, and the judgment is excessive and erroneous
42 and is not sustained by the evidence in this action.

20th. The court erred in entering judgment upon said findings of fact in favor of the plaintiff and against the defendant for the sum of $5,500.00, together with costs and disbursements, for the reason that plaintiff was not entitled to judgment against defendant in said sum or any sum whatever, and for the further reason that said sum of $5,500.00 is exorbitant and excessive and is not sustained by the evidence in this action.

Defendant specifies the particular errors in law occurring at the trial and excepted to by the defendant as follows:

I.

The court erred in proceeding to try said action without personal service upon the defendant Josephine M. Whitley without the state of Idaho.

II.

The court erred in proceeding to try said action because it had no jurisdiction of the necessary parties and had no right or authority to proceed to hear and determine the same.

III.

The court erred in denying the defendant's motion to dismiss this action as against this defendant made at the close of the plaintiff's testimony upon the ground that the court had no jurisdiction to hear and decide this action, and that the necessary parties were not before the court.

IV.

The court erred in denying defendant's motion to dismiss this action as to this defendant after the close of all the testimony
43 upon the grounds that this court had no jurisdiction and the necessary parties were not before the court and the evidence was insufficient to sustain any decree in favor of the plaintiff.

V.

The court erred in finding in favor of the plaintiff and against this defendant.

VI.

The court erred in making conclusions of law in favor of the plaintiff and against the defendant and erred in entering judgment in this action in favor of the plaintiff and against the defendant.

This motion will be made and based upon the records and files of this action, the minutes of the court and evidence introduced on trial of this action and the judgment of the court entered herein, together with the findings of facts and conclusions of law made, entered and filed with said judgment and decree.

Dated this 6th day of November, 1912.

GRAVES, KIZER & GRAVES,
Residence and P. O. Address, Spokane, Washington.
WHITLA & NELSON,
Residence and P. O. Address, Cœur d'Alene, Idaho; Attorneys for Defendant Spokane & Inland Empire Ry. Co.

Due and legal service of the within and foregoing Notice of Motion for New Trial admitted, and the receipt and retention of a true and correct copy thereof acknowledged at Cœur d'Alene, Idaho, this 6 day of November, 1912.

ELDER & ELDER,
Attorney- for Plaintiff.

Endorsed and filed Nov. 6, 1912.

44 DEF'T'S EX. I.

In the Superior Court of the State of Washington in and for the County of Spokane.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Summons.

The State of Washington to the said Spokane & Inland Empire Railroad Company, defendant:

You are hereby summoned and required to appear within twenty days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled action in the Court aforesaid, and Answer the Complaint of the Plaintiff herein, and serve a copy of your Answer upon the undersigned attorneys for

said plaintiff, at their office below stated; and in case of your failure so to do, judgment will be taken against you according to the demand of the complaint herein, a copy of which is herewith served upon you, the original of which will be filed with the Clerk of the above entitled Court.

HAMBLEN & GILBERT,
Attorneys for Plaintiff.

P. O. Address: 803 Paulsen Bldg., Spokane, Spokane County, Washington.

45 In the Superior Court of the State of Washington in and for the County of Spokane.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff complains of the defendant, and for her cause of action alleges:

I.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of A. P. Whitley, deceased.

II.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Washington and owning and operating a general electric railway system between the city of Spokane, State of Washington, and the City of Cœur d'Alene, State of Idaho, and in the operation of said railroad is a common carrier of passengers and freight for hire.

III.

That on the 31st day of July, A. D. 1909, A. P. Whitley purchased a ticket from the defendant company entitling him to ride upon the train operated by said defendant company between the City of Cœur d'Alene, Idaho, and the City of Spokane,
46 Washington, and between the hours of three (3) o'clock and five (5) o'clock P. M., entered a west bound train of the defendant company at Cœur d'Alene City for the purpose of traveling thereon from said Cœur d'Alene City to the said City of Spokane.

That shortly after the said train left the said City of Cœur d'Alene, and at a point at or near the Station of Gibbs, in the State of Idaho, and about five (5) miles north and west of said City of Cœur

d'Alene, and while a passenger as aforesaid on said train, the said A. P. Whitley received mortal injuries from which he died immediately thereafter.

IV.

That the said death of said A. P. Whitley was caused solely by the negligent and careless manner in which the defendant operated the said train on which said A. P. Whitley was a passenger, the said negligence and carelessness of said defendant consisting in the operation of its said trains in such a manner that the west bound train on which said A. P. Whitley was traveling collided with an east bound train of the defendant company, and which defendant company was operating at or near the Station of Gibbs hereinabove described, on account of which collision the said A. P. Whitley was killed.

V.

That at the time of the death of said A. P. Whitley, Josephine M. Whitley, who as administratrix of the estate of said A. P. Whitley, deceased, is the plaintiff herein, was the wife of said A. P. Whitley, and resided with said A. P. Whitley in the County of Shelby, State of Tennessee.

That shortly after the death of said A. P. Whitley, the plaintiff herein presented a claim for damages for the death of said A. P. Whitley, to the defendant herein, and thereafter, and to-wit: on the 14th day of September, A. D. 1909, the said defendant agreed to pay to the plaintiff the sum of eleven thousand dollars ($11,000.00) for and on account of the death of said A. P. Whitley, caused
47 by the carelessness and negligence of said defendant as herein fully alleged.

That at said time above referred to, the plaintiff herein believing that the said amount so offered was a full, fair and adequate settlement for the death of said A. P. Whitley, and desiring to avoid the costs and expenses incident to a suit against said company, and in pursuance of the order of the Probate Court of Shelby County, State of Tennessee, authorizing and directing the plaintiff herein to accept and receive the said sum of eleven thousand dollars ($11,000.00) in full settlement of all claims against said defendant by reason of the death of said A. P. Whitley, the said plaintiff did agree to accept the said sum of eleven thousand dollars ($11,000.00) in full settlement of all claims against said company for the death of said A. P. Whitley.

That thereupon the said defendant paid to this plaintiff the sum of Fifteen hundred dollars ($1500.00) as part payment of said sum of eleven thousand dollars ($11,000.00) agreed to be paid by it as aforesaid.

VI.

That since the payment of said fifteen hundred dollars, the said defendant herein has refused, and still refuses to pay to the plaintiff herein, the balance of nine thousand five hundred dollars ($9,500.00), as agreed to be paid by it, though often times requested so to do by the plaintiff.

VII.

That under and by virtue of the laws of the State of Idaho, and particularly by virtue of the authority contained in section #4100 of Vol. II of the Idaho Revised Codes, which is as follows:—"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who
48 is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just", the plaintiff herein is entitled to institute this proceeding against defendant to recover the amount due for the death of said A. P. Whitley.

That the said A. P. Whitley was over the age of twenty-one years at the time of his death.

Wherefore, plaintiff prays for judgment against the defendant herein for the sum of nine thousand five hundred — ($9,500.00) and for her costs and disbursements herein.

HAMBLEN & GILBERT,
Attorneys for Plaintiff.

49 STATE OF WASHINGTON,
County of Spokane, ss:

L. R. Hamblen, being first duly sworn, upon oath deposes and says, that he is one of the attorneys for the plaintiff in the foregoing action, that he makes this verification for and on behalf of the plaintiff for the reason that she is not at present in the County of Spokane, State of Washington; that he has read the foregoing complaint, knows the contents thereof and that the allegations contained therein are true as he verily believes.

L. R. HAMBLEN.

Subscribed and sworn to before me this 4th day of November, 1909.

W. S. GILBERT,
Notary Public, Residing at Spokane, Washington.

Filed: Nov. 18, 1909, at 9:10 o'clock A. M. C. E. Atkinson, Clerk. W. A. Cummings, Deputy.

50 In the Superior Court of the State of Washington for Spokane County.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Answer.

Defendant, Spokane & Inland Empire Railroad Company makes the following answer to the complaint of plaintiff:

I.

Answering paragraph one of the complaint of plaintiff, defendant denies that it has any knowledge or information thereof sufficient to form a belief, and it therefore denies each and every allegation, matter and thing in said paragraph one made and contained.

II.

Defendant admits the allegations of paragraphs two and three of the complaint of plaintiff.

III.

Answering paragraph four of the complaint of plaintiff, defendant denies each and every allegation, matter and thing in said paragraph four made and contained.

51 IV.

Answering paragraph five of the complaint of plaintiff, defendant denies that it made any binding agreement to pay plaintiff the sum of eleven thousand ($11,000) dollars, but alleges that the only agreement made with plaintiff was a provisional one for the payment of such sum when the plaintiff should submit to the defendant due proof of her authority to make such settlement, and due proof of the entry of an order by the Probate Court having jurisdiction, authorizing and directing the plaintiff to accept and receive the said sum of eleven thousand dollars in full settlement of all claims of the heirs and estate of said A. P. Whitley, deceased, against this defendant; and defendant denies that it has any knowledge or information sufficient to form a belief as to whether this order has ever been made, and defendant therefore denies that any order of the Probate Court of Shelby County, State of Tennessee, authorizing or directing plaintiff to accept and receive $11,000 as aforesaid, or at all, has ever been made or entered.

V.

Defendant admits the allegations of paragraph six.

VI.

Answering paragraph seven of the complaint of plaintiff, defendant denies that it has any knowledge or information sufficient to form a belief concerning each and all the allegations thereof, and it therefore denies each and every allegation, matter and
52 thing in said paragraph seven made and contained.

Further answering the complaint of plaintiff, and for an affirmative defense thereto, defendant alleges that prior to the bringing of this suit by the plaintiff herein, and on to-wit, the 25th day of October, 1909, one Mary Elizabeth Whitley, brought suit against this defendant and ag-inst Josephine Whitley, in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, in which said suit the said Mary Elizabeth Whitley has plead the same cause of action stated in paragraphs II to IV, both inclusive, of the complaint of plaintiff, and said Mary Elizabeth Whitley demands judgment therefor against this defendant in the sum of $25,000. A true and correct copy of her said complaint is hereto attached, and is hereby made a part of this answer. Said suit was brought by said Mary Elizabeth Whitley as mother of the same A. P. Whitley, of whose estate plaintiff alleges she is administratrix, and said Mary Elizabeth Whitley sues as one of the heirs of said A. P. Whitley. In said suit, Josephine Whitley, the wife of said A. P. Whitley, deceased, is joined as co-defendant with this defendant by virtue of an allegation in said complaint that said Josephine Whitley refuses to join in said suit as one of the parties plaintiff, and she is therefore made party defendant. This defendant further alleges that Mary Elizabeth Whitley is, under and by virtue of the laws of the State of Idaho, where the plaintiff's cause of action arose, one of the heirs of said A. P. Whitley,
53 deceased, and this defendant further alleges that said Mary Elizabeth Whitley, as such heir, is entitled to maintain said suit against this defendant.

This defendant further says that if the plaintiff in this action is permitted to recover full compensation, or any compensation in this action, on behalf of the estate of A. P. Whitley, defendant will be subject to the payment of full compensation to the heirs of said A. P. Whitley, deceased, a second time in the action brought by said Mary Elizabeth Whitley in the said District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, inasmuch as said action in the courts of Idaho was instituted prior to the institution of this action, and the courts of the State of Idaho will refuse to stay proceedings or to dismiss said action on account of the bringing of this action.

Wherefore defendant demands judgment of this court that this action be dismissed, or in case the court shall deem that this defendant is not entitled to have this action dismissed, that then all

further proceedings in this action be stayed until the determination of the action in Idaho by said Mary Elizabeth Whitley.

GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

54 STATE OF WASHINGTON,
County of Spokane, ss:

W. G. Davidson, being first duly sworn, on his oath states: That he is an officer of the within named defendant, to-wit, its secretary, and that he makes this verification for and on its behalf; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. G. DAVIDSON.

Subscribed and sworn to before me this 15th day of November, 1909.

B. H. KIZER,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Service of the within Answer is hereby acknowledged this *day of* November 16, 1909.

HAMBLEN & GILBERT,
Attorneys — Pl'ff.

Filed Nov. 18, 1909, at 9:15 o'clock A. M. C. E. Atkinson, Clerk, C. E. Atkinson.

55 In the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai.

MARY ELIZABETH WHITLEY, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, and JOSEPHINE WHITLEY, Defendants.

Complaint.

The above named plaintiff complains of the above named defendants, and for cause of action alleges:

I.

That the plaintiff now is and at all the times herein mentioned was a citizen and resident of the State of Texas, residing at Corsicana, Texas.

II.

That at all the times herein mentioned the defendant, The Spokane & Inland Railroad Company, a corporation, was and yet is a railway corporation, duly organized and existing under and by

virtue of the laws of the State of Washington, with its principal place of business at Spokane, Washington.

III.

That on, to-wit: the 31st day of July, A. D. 1909, said defendant was and for a long time prior thereto had been and yet is the owner and in possession of that certain railroad laid out and constructed and extending from the City of Cœur d'Alene in the State of Idaho to the City of Spokane in the State of Washington, heretofore known as the Cœur d'Alene and Spokane Railway, together with all
56 the tracks, rolling stock and other appurtenances thereto belonging, and at all of said times was engaged in the business and occupation of operating said railroad and trains of cars propelled thereover by electricity for the purpose of transporting and conveying thereon passengers and freight for hire and compensation, as common carriers.

IV.

That the plaintiff is the mother and sole surviving parent and heir at law of A. P. Whitley, a married man of the age of 33 years, who, up to the time of sustaining the injuries hereinafter mentioned, resided with his wife, Josephine Whitley, at Memphis, Tennessee. That at all times during his life up to the time he sustained said injuries hereinafter set out, the said A. P. Whitley had been a strong, bright and healthy man, and in all ways and respects a companion and comfort to the plaintiff, and for a long time prior to sustaining said injuries had been engaged in the practice of law, and as an attorney at law was capable of earning and did earn large sums of money, which he contributed to this plaintiff for her maintenance and support, and would have continued to do so, thereby adding greatly to the welfare, comfort and happiness of plaintiff, but for the careless and negligent acts of the defendant, the Spokane & Inland Empire Railway Company, a corporation, hereinafter set out.

V.

That on, to-wit: the 31st day of July, A. D. 1909, at the City of Spokane in the State of Washington, defendant, *in* the Spokane & Inland Empire Railway Company, a corporation, in consideration of the fare charged and paid to it therefor, undertook and agreed as such common carrier to safely transport and convey said A. P. Whitley, as a passenger, in its said train of cars, over its said railroad, from the City of Spokane to the City of Cœur d'Alene
57 and return, and the said A. P. Whitley thereupon lawfully entered one of said passenger trains of said defendant to be so conveyed, and was by defendant so transported and conveyed to the said City of Cœur d'Alene on said day; that thereafter, to-wit: on the day and year last aforesaid, at said City of Cœur d'Alene, said A. P. Whitley lawfully entered one of the passenger trains of defendant, The Spokane & Inland Empire Railway Company, a corporation, on said railroad, as such passenger, for the purpose of

being by said defendant transported, conveyed and returned to said City of Spokane, and thereupon said passenger train with said A. P. Whitley thereon, as such passenger, started upon its trip to said City of Spokane on said railroad, and when at a point in Kootenai County, State of Idaho, at or near what is known as Lacrosse or Gibbs Station, a collision occurred by said train and another train of said defendant, the Spokane & Inland Empire Railway Company, a corporation, then running upon defendant's said railroad, enroute from said City of Spokane to said City of Cœur d'Alene, then and there running against and into each other, whereby said train upon which said A. P. Whitley was then and there being, was greatly smashed, broken and wrecked, and said A. P. Whitley was mangled and mortally wounded, of which injuries he, the said A. P. Whitley, died on the 31st day of July, A. D. 1909, at said County of Kootenai, State of Idaho.

VI.

That said collision and death of said A. P. Whitley were wholly caused by and through the careless and negligent operation and running of said trains by said defendant, the Spokane & Inland Empire Railway Company, a corporation, and its agents, servants and employees in charge and control thereof and without any fault or negligence on the part of said A. P. Whitley or plaintiff.

VII.

That said A. P. Whitley was at the time he received the
58 injuries hereinbefore set out and for a long time prior thereto had been furnishing this plaintiff with money and means for her support and maintenance; that the plaintiff has no property and no money with which to support herself, and no other means of support, and is in *in* indigent circumstances.

VIII.

That Josephine Whitley, the above named defendant, is the widow of the said A. P. Whitley, and that there are no children as the issue of the marriage of said A. P. Whitley and Josephine Whitley. That the said A. P. Whitley left no children and that this plaintiff, the mother of said A. P. Whitley, and Josephine Whitley, the widow of said A. P. Whitley, are the sole and only heirs at law of the said A. P. Whitley.

IX.

That Josephine Whitley is a necessary party plaintiff in this action but has refused to join as plaintiff and is therefore made party defendant.

X.

That by reason of the death of the said A. P. Whitley, caused by and through the careless and negligent acts of the defendant, the Spokane & Inland Empire Railway Company, a corporation, as

aforesaid, and by reason of the facts herein alleged, plaintiff became and is deprived of the services, physical and mental labors and energies, comfort, happiness, society and companionship of said A. P. Whitley, and is thereby damaged in the sum of twenty-five thousand dollars ($25,000).

Wherefore plaintiff demands judgment against said defendant the Spokane & Inland Empire Railway Company, a corporation, for the said sum of twenty five thousand dollars ($25,000) together with her costs in this behalf laid out and expended.

59 In the Superior Court of the State of Washington in and for the County of Spokane.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Reply.

Comes now the plaintiff and in reply to the affirmative matter alleged in defendant's answer:

Admits that suit has been brought in the district Court of the Eighth Judicial Court of the State of Idaho in and for the County of Kootenai, by Mary Elizabeth Whitley, the mother of A. P. Whitley, deceased, against the defendant herein, as fully alleged in the said affirmative answer of defendant, but denies that the said defendant will be subject to the payment of compensation by reason of the rendition of the judgment in said suit in the event of the payment of the amount due as fully alleged in the complaint of plaintiff herein.

Plaintiff alleges that as administratrix of the estate of A. P. Whitley, deceased, she had full power and authority under the laws of the State of Idaho, as set forth in the complaint and in the answer of defendant to agree to a settlement of the said claim against said company, and that a settlement thereof would be a full and complete bar to the recovery of any sum or sums in the said suit brought in the State of Idaho as aforesaid.

Wherefore, plaintiff prays that judgment be entered herein as fully set forth in her complaint, and that the prayer of said defendant be denied.

HAMBLEN & GILBERT,
Attorneys for Plaintiff.

60 STATE OF WASHINGTON,
County of Spokane, ss:

L. R. Hamblen, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause, that he makes this verification for and on behalf of the plaintiff for the reason that she is not now within the County of Spokane;

that he has read the foregoing reply, knows the contents thereof and that the allegations contained therein are true as he verily believes.

L. R. HAMBLEN.

Subscribed and sworn to before me this 17th day of November, 1909.

W. S. GILBERT,
Notary Public, Residing at Spokane, Washington.

Service of the within Reply is hereby acknowledged this 17th day of Nov., 1909.

GRAVES, KIZER & GRAVES,
Attorneys for Def't.

Filed Nov. 18, 1909, at 9:10 o'clock A. M. C. E. Atkinson, Clerk. W. A. Cummings, Deputy.

61 In the Superior Court of the State of Washington for Spokane County.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Findings of Fact and Conclusions of Law.

The above entitled cause came on regularly for trial on this date before the court without a jury, both plaintiff and defendant appearing herein by their respective counsel, and the court having heard the evidence arruced by the respective parties hereto, does now make the following

Findings of Fact.

I.

Plaintiff Josephine M. Whitley is and for some time prior to the commencement of this action has been the duly appointed, qualified, and acting administratrix of the estate of A. P. Whitley, deceased, having been appointed as such administratrix in the Probate Court of ShelbyCounty, State ofTennessee, in which said county her decedent, A. P. Whitley had his domicile at the time of his death, and in which county the said A. P. Whitley left estate subject to distribution, and said Probate Court of Shelby County, Tennessee, is the court under the laws of the State of Tennessee which had jurisdiction to make appointment of such administratrix.

62 II.

Defendant is an electric railway corporation duly organized and existing under the laws of the State of Washington, with its principal

place of business in the City of Spokane, and it owns and operates an electric railway system between the City of Spokane, Washington, and Cœur d'Alene, Idaho, and in the operation of such electric railway is a common carrier for hire of passengers and freight.

III.

On the 31st day of July, 1909, plaintiff's decedent, A. P. Whitley, while a passenger on one of the electric railway trains of the defendant was mortally injured and shortly thereafter died as the result of a collision between two of defendant's electric railway trains at or near Gibbs, Idaho, on one of which said A. P. Whitley was then and there a passenger, and said A. P. Whitley's death was caused by the negligent operation of said electric trains by defendant. There was no negligent act or omission on the part of the said A. P. Whitley which in any wise contributed to the causing of his death, and by reason thereof the defendant Spokane & Inland Empire Railroad Company became and is liable to the plaintiff for all damages accruing to the heirs of said A. P. Whitley. At the time of his death, said A. P. Whitley was a lawyer engaged in the active practice of his profession at Memphis, Tennessee. He was of the age of about thirty-four years. He has been married but a short time, and left no children. In view of his age, his earning capacity, and his station in life, the court deems the sum of eleven thousand ($11,000) dollars to be a just and adequate compensation to be awarded to the heirs and estate of A. P. Whitley, deceased, and a judgment for that amount in favor of the
63 plaintiff will be full compensation for the death of the said A. P. Whitley.

IV.

Said A. P. Whitley was not a resident of the State of Idaho, and at no time left any estate therein, but at the time of his death, and for a long time prior thereto, had been a resident of Shelby County, Tennessee, where he left estate subject to distribution. Plaintiff is and at all times herein mentioned was, the wife of said A. P. Whitley, deceased. The laws of the State of Idaho, where said A. P. Whitley met his death, prescribe as follows: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, "and by virtue thereof the plaintiff herein is entitled to institute this proceeding against defendant to recover the amount due for the death of the said A. P. Whitley.

V.

Shortly after the death of the said A. P. Whitley the plaintiff herein presented a claim for damages for the death of A. P. Whitley to the defendant herein, and thereafter, to-wit: on the 14th day of September, 1909, said defendant agreed to pay to the plaintiff the sum of eleven thousand ($11,000) dollars as full compensation to

the estate and heirs of A. P. Whitley, deceased, for the death of the said A. P. Whitley caused by the negligence of the defendant, and at said time above referred to, the plaintiff believe that said amount so offered was full, fair, and adequate settlement for the death of the said A. P. Whitley, and desiring to avoid costs and expenses incident to a suit against said defendant, agreed to accept such amount as such administratrix as full compensation
64 to said estate and the heirs of A. P. Whitley. Thereupon, all of the facts and circumstances concerning the death of A. P. Whitley were fully disclosed to the Probate Court of Shelby County, Tennessee, and said court was prayed by the plaintiff for an order authorizing her to make such settlement. Thereupon, said court having jurisdiction of the said matter, upon considering said application, duly authorized and empowered plaintiff herein to accept and receive the said sum of eleven thousand ($11,000) dollars in full settlement of all claims of the estate and heirs of A. P. Whitley against said defendant. Thereupon, the plaintiff and defendant ratified said agreement theretofore made by them, and the defendant company paid to the plaintiff the sum of fifteen hundred ($1500) dollars as part payment of the said sum of eleven thousand ($11,000) dollars agreed to be paid by it as aforesaid, and the said plaintiff, at all times since the entry of said order in the Probate Court of Tennessee has been duly authorized and empowered, and is now duly entitled to receive the balance of said sum of eleven thousand dollars.

VI.

Subsequent to the entry of said order in the Probate Court of Shelby County, Tennessee, authorizing said settlement, and subsequent to the ratification thereof by the plaintiff and defendant, and subsequent to the payment of said sum of fifteen hundred dollars, on to-wit, the 25th day of October, 1909, one Mary Elizabeth Whitley, duly instituted suit against this defendant and against Josephine Whitley in the District Court of the Eighth Judicial District of the State of Idaho for Kootenai County. Said Mary Elizabeth Whitley instituted said suit as one of the heirs of said A. P. Whitley, deceased, joining Josephine Whitley for the reason that she is the other heir of A. P. Whitley and
65 al-eging that she refuses to join in said suit as a party plaintiff. Said suit so instituted by Mary Elizabeth Whitley is for the same cause of action as the one settled by the agreement of the parties hereto prior to the institution of said action.

From the foregoing Findings of Fact the court now makes the following

Conclusions of Law.

The institution of the suit in the courts of Idaho against the defendant Spokane & Inland Empire Railroad Company by Mary Elizabeth Whitley as one of the heirs of A. P. Whitley, deceased, in which said suit the other of the heirs is made party defendant is

not a defense to this action, nor does it entitle the defendant to have the prosecution of this suit on behalf of the plaintiff stayed until a determination of the Idaho action. Plaintiff is entitled to judgment against the defendant for the remainder of the amount due her as administratrix of the estate of A. P. Whitley, to-wit, nine thousand five hundred ($9500) dollars, together with her costs.

Done in open court this 18 day of November, 1909.

J. D. HINKLE, *Judge.*

Filed Nov. 18, 1909, at 9:45 o'clock A. M. C. E. Atkinson, Clerk, E. E. Burton, Deputy.

66 In the Supreior Court of the State of Washington in and for the County of Spokane.

JOSEPHINE M. WHITLEY, as Administratrix of the Estate of A. P. Whitley, Deceased, Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Judgment.

This matter coming on regularly for hearing this 18th day of November, 1909, and the plaintiff herein appearing by Messrs. Hamblen & Gilbert, her attorneys, and the defendant herein appearing by Messrs. Graves, Kizer & Graves, its attorneys, and the cause having been fully tried by the court without jury, and the court having made findings of fact and conclusions of law herein, and being duly advised in the premises, now therefore, upon and because of said findings of fact and conclusions of law.

It is ordered, adjudged and decreed, that the plaintiff have and recover of and from the defendant herein, the sum of nine thousand five hundred dollars ($9,500.00) together with her costs and disbursements herein.

Done in open court this 18th day of November, 1909.

J. D. HINKLE, *Judge.*

Filed Nov. 18, 1909, at 10 o'clock A. M. C. E. Atkinson, Clerk, E. E. Burton, Deputy. Recorded Journal 128, page 219, Execution Docket 1, page 27.

67 In the Superior Court.

THE STATE OF WASHINGTON,
County of Spokane, ss:

I, Glenn B. Derbyshire, Clerk of the Superior Court, within and for said County of Spokane, State of Washington, do hereby certify that I have compared the foregoing copies of the record of the

summons and complaint, answer, reply, findings of fact and conclusions of law, and judgment, in the case of Josephine M. Whitley as Administratrix of the estate of A. P. Whitley, deceased, plaintiff, vs. Spokane & Inland Empire Railroad Company, a corporation, defendant, No. 29275, with the original records thereof now remaining in this office and have found the same to be correct transcripts therefrom, and of the whole of such original records. And I further certify that said exemplification would be received in evidence in all the Courts of the state of Washington.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Spokane, in said County and State, this 5th day of July, 1912.

[SEAL.] GLENN B. DERBYSHIRE,
Clerk of said Superior Court.

In the Superior Court.

THE STATE OF WASHINGTON,
County of Spokane, ss:

I, E. H. Sullivan, one of the Judges of the Superior Court, within and for the said County of Spokane, State of Washington, do hereby certify that the said Court is a court of Record, and that Glenn B. Derbyshire, whose signature is affixed to the foregoing certificate, is the Clerk of said Superior Court; that said certificate is attested in due form of law; that the aforesaid signature of said Clerk is genuine, and that the seal thereto affixed is the seal of said Superior Court.

Witness my hand at Spokane, in said County and State this 5th day of July, A. D. 1912.

68 E. H. SULLIVAN,
Judge of said Superior Court.

In the Superior Court.

THE STATE OF WASHINGTON,
County of Spokane, ss:

I, Glenn B. Derbyshire, Clerk of the Superior Court, within and for the County of Spokane, State of Washington, do hereby certify that the Hon. E. H. Sullivan, whose name is subscribed to the preceding certificate, is one of the Judges of the Superior Court, within and for the County of Spokane aforesaid, duly elected, sworn and qualified, and that the signature of said Judge to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed seal of said Court at Spokane, in said County and State, this 5th day of July, A. D. 1912.

[SEAL.] GLENN B. DERBYSHIRE,
Clerk of said Superior Court.

69 DEF'T'S EX. #2.

Probate Court of Shelby County.

STATE OF TENNESSEE,
Shelby County, ss:

Pleas before the Honorable J. S. Galloway, Judge of the Probate Court of Shelby County, Held in the City of Memphis and State and County Aforesaid, and at the September Term Thereof, 1909.

Be it remembered, that on to-wit, 2nd day of October, 1912, it being one of the days of said September, 1912, Term, the following appears of records in the words and figures, viz:

No. 14279, R. 17.

In re Estate of A. P. WHITLEY, Dec'd.

The petition of Mrs. Josephine M. Whitley, widow of A. P. Whitley, deceased, having been presented and considered by the Court and the Admr. heretofore appointed having consented to the revocation of letters heretofore granted him, and it appearing to the Court that said Mrs. Josephine M. Whitley, as the widow of decedent, is first entitled to the appointment to Administer on the said estate, it is therefore ordered by the Court that the letters heretofore granted to A. H. Kortrecht as Administrator of the estate of A. P. Whitley, dec'd, are hereby revoked & letters will issue to Mrs. Josephine M. Whitley, as adm'r de bonis non of said estate upon the execution of bond for $300.00 conditioned according to law.

Whereupon she presented her bond in said penalty with F. S. Elgin & A. H. Kortrecht as sureties thereon & same having been examined by the court is hereby approved and letters are ordered to her accordingly.

70 *Letters of Administration.*

STATE OF TENNESSEE,
Shelby County:

To Josephine M. Whitley, a citizen of said county:

It appearing to the Probate Court, now in session, that A. P. Whitley has died, leaving no Will, and the Court being satisfied as to your claim to the administration, and you having given bond and qualified as directed by law, and the Court having ordered that Letters of Administration D. B. N. be issued to you,

These are, therefore, to authorize and empower you to take into your possession and control, all the Goods, Chattels, Claims and Papers of the said intestate, and return a true and perfect inventory

thereof to our next Probate Court; to collect and pay all debts, and to do and transact all the duties in relation to said estate, which lawfully devolves on you as Administratrix, D. B. N. and after having settled up said estate, to deliver the residue thereof to those who are by law entitled.

Witness, Thos. B. Crenshaw, Clerk of said Court, at office, this 2 day of Oct., 1909, and the 134 year of American Independence.

T. B. CRENSHAW, *Clerk,*
By JAS. BRITT, JR., *D. C.*

71 STATE OF TENNESSEE,
Shelby County, ss:

I, Thos. B. Crenshaw, Clerk of the County and Probate Courts of said County, do hereby certify that the foregoing Two (2) pages contain a full, true and perfect copy of the Order apptg. Josephine M. Whitley, Admr. D. B. N. & appg. Bond & Letters of Admr. issued to her, as the same appears of record in Admr. Record 21, pp. 89 now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office in the city of Memphis, this 14 day of Aug. 1912.

[SEAL.] THOS. B. CRENSHAW, *Clerk.*

Probate Court Room.

STATE OF TENNESSEE,
Shelby County:

MEMPHIS, TENN., Aug. 14, 1912.

I, J. S. Galloway, sole and presiding Judge of the Probate Court of said County, certify that Thos. B. Crenshaw, who gave the foregoing Certificate, is now, and was at the time of signing the same, Clerk of said Court, and that said Court is a Court of Record, and that his attestation is in due form, and his official acts, as such, are entitled to full faith and credit.

Witness my hand, this 14 day of Aug., 1912.

J. S. GALLOWAY, *Judge.*

STATE OF TENNESSEE,
Shelby County:

I, Thomas B. Crenshaw, Clerk of the Probate Court of said County, certify that Hon. J. S. Galloway, whose genuine official signature appears to the above and hereto annexed Certificate, is and was at the time of signing the same, sole and presiding Judge of the Probate Court in and for the County and State aforesaid, duly commissioned and qualified, and that all his official acts, as such, are entitled to full faith and credit.

72

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office, in the city of Memphis, this 14 day of Aug., 1912.

[SEAL.] THOS. B. CRENSHAW, *Clerk.*

6—206

73 DEF'T'S EX. 3.

Certified Copies.

Petition.

In the Probate Court of Shelby County, Tennessee.

In re Estate of A. P. WHITLEY, Deceased.

To the Honorable J. S. Galloway, Judge:

Your Petitioner, Mrs. Elizabeth Whitley, respectfully represents and shows to the Court that she is a resident of the State of Idaho, and was the mother of A. P. Whitley, deceased.

Petitioner further shows that on July 31st, 1909, the said decedent was killed in a wreck near the town of Cœur d'Alene, Idaho, and that from the accident resulting in his death, a cause of action arose against the railroad on which the said decedent was then a passenger. Under the wrongful death statute of Idaho, it is provided as follows:

"If decedent leave no issue, the estate goes one-half (½) to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either be dead, the whole of said half goes to the other."

The quotation is from Section 5702 of the Revised Codes of Idaho.

Petitioner further states and shows to the Court that the Administratrix, Mrs. Josephine Whitley, heretofore appointed by this Court, has executed a bond of only five hundred dollars ($500.00), while, as petitioner is informed and believes, said administratrix has already compromised or settled this cause of action against said Railroad, for the sum of eleven thousand dollars ($11,000.00), and that such settlement was authorized by this Court to be made.

74 In consideration of the premises, Petitioner prays for an order to be entered herein directing and requiring the execution of a bond by the said Administratrix in a sum not less than Seventy-Five Hundred Dollars ($7500.00), to the end that this Petitioner may be protected in the assertion of her right as she will do at a seasonable time.

CARY & ROGERS,
Attorneys for Petitioner.

STATE OF TENNESSEE,
County of Shelby:

R. P. Cary makes oath in due form of law that he is one of the attorneys for Petitioner in the foregoing petition, and that the facts stated therein are true to the best of his knowledge, information and belief.

R. P. CARY.

Subscribed and sworn to before me Feb'y 16, 1910.
E. B. CRENSHAW, *D. C.*

75 *Cost Bond.*

We, Mrs. Elizabeth Whitley as principal and —— —— acknowledge ourselves indebted to Mrs. Josephine Whitley, Complainant in a petition which has this day been filed in the Probate Court of Shelby County, against the said Josephine Whitley — shall pay all such costs as may be awarded against her by the Court in its decrees and orders in said Bill.

This 17 day of Feb'y 1910.

MRS. ELIZABETH WHITLEY, [SEAL.]
By CARY & ROGERS, *Att'ys.* [SEAL.]
R. P. CARY, *Surety.* [SEAL.]
—— ——. [SEAL.]

Sureties sworn and justified before me, and by me approved.
T. B. CRENSHAW, *Clerk.*
E. B. CRENSHAW, *D. C.*

76 *Amended and Supplemental Petition.*

In the Probate Court of Shelby County, Tennessee.

In re Estate of A. P. WHITLEY, Deceased.

To the Honorable J. S. Galloway, Judge:

Your Petitioner, Mrs. Elizabeth Whitley, respectfully states and shows to the Court that on February 17th, 1910, she filed in this Court and in this cause her original petition, wherein she averred, among other things, that she was a resident of the State of Idaho and the mother of A. P. Whitley, deceased: that on July 31, 1909, her son was killed in a railroad wreck which occurred in the State of Idaho, and that therefore a cause of action accrued against the said Railroad. In said original petition, petitioner quoted from Section 5702 of the Revised Codes of Idaho, touching the distribution of the assets of decedent. Petitioner further averred, in said original petition, that the administratrix heretofore appointed by this Court herein had executed a bond for only five hundred dollars, while there was already a fund of eleven thousand dollars, ($11,000.00) in her hands for distribution under the law. In said petition, it was prayed that an order be entered directing the execution of a large bond by said administratrix, to-wit, seventy-five hundred dollars ($7,500.00).

And now, Petitioner comes and brings this, her amended and supplemental petition, and respectfully states and shows to the Court that her said petition of February 17th, 1910, was hurriedly prepared by R. P. Cary, one of her attorneys herein, and by
77 inadvertence Petitioner was therein alleged to be a resident of the State of Idaho, when in truth and in fact she is a resident of the State of Texas.

Petitioner further avers that, at the time of the preparation and drafting of said original petition, her said attorney had not access to and had not before him the Revised Codes of the State of Idaho, and therefore was in error in reciting that Section 5702 of said Revised Codes, as quoted in said original petition, was a part of the wrongful death statute of that State.

Petitioner now avers the fact to be that she is a resident of the State of Texas, and was the mother of the said decedent. Mrs. Josephine Whitley has heretofore been appointed by this Court Administratrix of the estate of Petitioner's said son, who was the husband of said Mrs. Josephine Whitley.

Petitioner further avers that by Section 4100 of the Revised Codes of Idaho it is provided that:

"When the death of a person, not being a minor is caused by the wrongful act *of* neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Petitioner avers that she is, according to the laws of said State of Idaho, one of the heirs of A. P. Whitley, the decedent, and that said decedent left no issue surviving him.

Petitioner further states and shows to the Court that Section 5702 (Sub-section 2) of the revised Codes of Idaho provides as follows:

"If the decedent leave no issue, then the estate goes, one half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and
78 mother, in equal shares, or if either be dead, then to the other."

Petitioner is advised that, by reason of the relationship of mother which she bore to said decedent, and by reason of his having died without issue, and by reason of his death having accurred in the State of Idaho and caused by the wrongful act or neglect of another, she is entitled as one of his heirs named and designated by said Sub-section 2 of Section 5702 of the Revised Codes of said State, to one-half (½) of any recovery of damages growing out of the death of said decedent.

Petitioner avers that heretofore the said Mrs. Josephine Whitley, the administratrix herein, has already recovered of the railroad causing the death of the said decedent, the sum of eleven thousand dollars ($11,000.00), by compromise settlement with said railroad company, which compromise settlement was authorized and approved by this Court.

Petitioner avers the- the said Mrs. Josephine Whitley resists and denies Petitioner's claim to said one-half (½) of said recovery, and asserts that Petitioner has no interest therein.

In consideration of the premises, Petitioner prays that the said

Mrs. Josephine Whitley be required, by the proper process of this Court, to appear and answer this petition; that the said Mrs. Josephine Whitley, as Administratrix may be further required, by the orders of this Court to execute a bond as Administratrix in the sum of Seven Thousand Five Hundred Dollars, ($7,500.00), or such other sum as may be sufficient to cover the interest of petitioner in said recovery against said railroad company, and also the costs of this proceeding; that upon the hearing, Petitioner's right to one-half (½) of said eleven thousand dollars, so recovered from said Railroad and now in the hands of Mrs. Josephine Whitley, as Administratrix, may be declared, adjudged and decreed; that such further judgments and decrees may be entered as will effect-
79 uate and carry into full execution the adjudication last herein prayed for; and that Petitioner may have also all such other, further and general relief, as the facts of the case may justify.

CARY & ROGERS,
Attorneys for Petitioner.

STATE OF TENNESSEE,
County of Shelby:

R. P. Cary, makes oath in due form of law that he is one of the attorneys for the Petitioner in the foregoing petition and that the facts stated therein are true to the best of his knowledge, information and belief.

R. P. CARY.

Subscribed and sworn to before me, this 14 day of March, 1910.
E. B. CRENSHAW, *D. C.*

80 ANSWERS AND EXHIBITS.

In the Probate Court of Shelby County, Tennessee.

In Re Estate of A. P. Whitley, Deceased.

Answer of Josephine Whitley, Administratrix of the Estate of A. P. Whitley, Deceased, to the Original Amended and Supplemental Petition of Mrs. Elizabeth Whitley, Filed Herein Against Her.

Respondent for answer says: She admits that the averments in the first paragraph of the amended and supplemental petition, relative to the original petition, are in substance correct.

She admits that petitioner is a resident of the State of Texas, and not of the State of Idaho, as stated in the original petition. She admits the allegations in regard to the error and reason therefor made in the original petition relative to citations of sections of the Revised Code of Idaho. She admits that petitioner is the

mother of A. P. Whitley, deceased, and that she is now and has been for many years, a resident of the State of Texas.

Respondent admits that she was heretofore duly appointed by this court as administratrix of the estate of A. P. Whitley, deceased, who was the husband of this respondent.

Respondent admits that Section 4100 of the Revised Code of Idaho, is as follows:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Respondent denies that petitioner, according to the laws
81 of the State of Idaho, is an heir of A. P. Whitley, deceased, for the purpose of claiming any rights under the wrongful death statute: she admits that Section 5702 (Sub-section 2) of the Revised Code of Idaho, is as follows:

"If the decedent leave no issue, then the estate goes, one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either be dead, the whole of said half goes to the other. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other."

But respondent is advised and so avers that this is a provision under the general statute of succession, and has absolutely no relevancy to the wrongful death statute and no relevancy to the question at issue, for the reason in the first place, that in the event of death, caused by the wrongful act or neglect of another, an action arises for the benefit of the personal estate of the deceased, to be brought by the personal representatives, and under such circumstances the distribution must be made according to the law of the domicile of the deceased; Second, Because neither the petitioner nor the decedent was a resident of the State of Idaho at the time of the death of the said A. P. Whitley, nor was either of them ever a resident of said State; Third, because the settlement of said wrongful death was made by this respondent as administratrix of the estate of said A. P. Whitley, deceased, who is a resident of Tennessee, and under the direction and approval of this Honorable Court, and that the money came into her hands as Administratrix, so appointed by this Court, and must be distributed according to the law of this State and not of the State of Idaho: Fourth, because by section 5711, a part of the succession statute of the State of Idaho, under which Section 5702 (Sub-section 2) is quoted by petitioner, provides as follows:

"The provisions of the preceding sections of this chapter, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents."

82 Respondent admits that her intestate died without issue, but denies, on advice of counsel, that "by reason of the relationship of mother which petitioner bore to said decedent, and by reason of his having died without issue, and by reason of his death having occurred in the State of Idaho, and caused by the wrongful act or neglect of another," that petitioner is entitled, "as one of the heirs of decedent," to one-half or any other portion of any recovery of damages growing out of the death of the said decedent.

Respondent denies that said petitioner has any interest whatever in said recovery, for the reason that under the law of the State of Tennessee, which was the domicile of the deceased, such money paid to her as administratrix, on account of the wrongful death of her husband, and coming into her hands in accordance with the order of this court, goes exclusively to respondent as the widow of the said A. P. Whitley, deceased, after deducting expenses, attorneys' fees and costs of administration.

Respondent admits that the amount of compromise with the railroad company which caused the death of her husband, was the sum of eleven thousand ($11,000.00) dollars, and that she was authorized to make said compromise settlement by this court, and that the same was duly approved by this court. Respondent avers, however, that the attorneys' fees and expenses incident to the collection of this sum amounts to twenty-five hundred ($2500.00) dollars, which, together with attorneys' fees incident to this proceeding, as well as the costs of administration, will have to be deducted therefrom.

Respondent admits that she resists and denies petitioner's claim to one half or any other part so recovered by compromise settlement, and admits that she claims and insists that petitioner has no interest whatever therein.

83 Respondent further denies that petitioner is entitled to any of the relief prayed for in either the original or amended and supplemental petition: denies that said petitioner has any interest whatever, in the funds in her hands as administratrix, denies that she has any right to insist on respondent giving any larger or additional bond than that already given and approved by this court; denies that petitioner has any right as would entitle her to make such insistance;—and all other allegations in said petition which are not expressly admitted, are here and now generally denied.

And for further answer, Respondent says:

That she and the deceased, A. P. Whitley, were duly married on the 24th day of January, 1904, in the State of Texas. At that time the said A. P. Whitley had no means whatever, and that this respondent had by industry and frugality succeeded in accumulating one thousand ($1,000.00) dollars, which she gave to her said husband and which was invested in a little home. Thereafter, her said husband decided to move to the State of Tennessee, which he did in the year of —, to prepare himself for the legal profession; that in order to do this the little home was sold, and the net proceeds were used for the purpose of defraying his expenses as a law student at

the Cumberland University, in the city of Lebanon, Tennessee. Respondent avers that by the use of the names thus originally contributed to her, said decedent did acquire a good legal education and entered upon the practice of his profession with good prospects, and at the time of his death was doing well, making enough, with economy on respondent's part, to live comfortably, though they were not able to have their own home or lay aside anything for the future.

Respondent states that she has not been in good health for
84 some time and that the death of her husband has greatly impaired her health.

Respondent further avers that her husband left no property, other than effects of small value; that the amount which she has received by virtue of his wrongful death, as administratrix of his estate, is practically all that she will have for her future support, and that the income from the balance left, after deducting expenses, attorneys' fees and costs incident to this proceeding, as well as the costs of administration will not exceed five hundred ($500.00) dollars per year, if continuously invested on a basis of six per cent per annum.

Respondent further avers that petitioner was in no sense dependent on decedent; that she has no pecuniary interest whatever in his life or in his estate; that she was, at the time of his death, and some time prior thereto and still is, living in the State of Texas; that her father, who is about eighty years of age, also lives there and that her said father is a man of large means,—besides, she has a daughter and son in Texas, who are also able to contribute to her support if it were needed.

Respondent further avers that petitioner instituted her proceeding in the probate court of Kootenai County in the State of Idaho, for the purpose of having her representative and Attorney, Robert H. Elder of said County, appointed administrator of A. P. Whitley, deceased, claiming that she was entitled to such administration and that she had an interest under the statute of Idaho in an action for wrongful death of the said A. P. Whitley. This petition was resisted by your respondent, who, in reply thereto set up the fact of her appointment in the State of Tennessee, which was the domicile of the deceased, and who had never at any time been a resident of the State of Idaho; that there was no property, goods or effects of the estate of said deceased in the State of Idaho, and that the
85 statutes of said State recognized the domicile of said deceased as the person in whose favor the claim for his wrongful death exists; that as the result of this proceeding petitioner failed to secure the appointment of her nominee as administrator, and that this action is a recognition of the right of respondent to said recovery and to have the same distributed according to the laws of the State of Tennessee; that these proceedings were in a court of record and of competent jurisdiction.

Respondent further avers that petitioner has brought her suit in the District Court of the Eighth Judicial District of the State of Idaho, against the Spokane & Inland Empire Railroad Co., and your respondent the purpose being to recover twenty five thousand ($25,-

000.00) dollars for the wrongful death of said A. P. Whitley, while a passenger on one of the trains of the said Spokane & Inland Empire Railroad. This suit was instituted on the 25th day of October, 1909. Respondent avers that the pendency of this suit was pleaded by the defendant in the Superior Court in the State of Washington, for recovery of damages for the wrongful death of her deceased husband, and in which a recovery was had by her; that the said Superior Court found that the pendency of said suit by petitioner in Idaho was no defense whatever to the suit brought by your respondent, and did not even entitle the defendant to have prosecution of this suit in Washington on behalf of this respondent stayed until a determination of the Idaho action, for the reason that the said A. P. Whitley had never been a resident of Idaho; had no estate therein to be distributed, and that the recovery in such action would go to respondent as Administratrix, appointed by the Probate Court of Shelby County, Tennessee; that by virtue of the settlement authorized and approved by this court the said defendant company paid over to her said sum of $11,000.00 in full and complete satisfaction of all demands against it for causing the death of
86 her said husband.

"Respondent files herewith as Exhibit "A" a duly exemplified copy of the proceedings in the said Superior Court at Washington, including the pleadings in the District Court at Washington, including the Pleadings in the District Court in the State of Idaho, which was filed in said Superior Court at Washington, and asks that same be considered a part hereof but need not be copied."

Respondent also pleads and relies on the action of the Probate Court of Kootenai County, of the State of Idaho, as a bar to any claim of the petitioner under the statutes of Idaho, even if such statute could have any force, which she denies.

Respondent relies upon the laws of the State of Tennessee, which make her the sole distributee of the personal property of her deceased husband, and vests in her absolutely and solely all right, title and interest in and to the money received by her on account of the wrongful death of her husband; that under the statute of Idaho, Section 4100, there is no provision designating parties for whose benefit the recovery shall inure, nor does said statute attempt to state the persons who shall be divided or distributed: On the other hand, under such statute the suit must be brought by the administrator of the estate of the deceased; that the recovery goes to the administrator, and, necessarily, therefore, must be distributed according to the law of the domicile of the deceased. The right of a foreign administrator to recover for the death of his intestate is recognized by the law of Idaho, and was in this particular case, and that, regardless of whether this were true or not, a recovery when had by such administrator of the estate of a person residing in another State, must be distributed according to the law of the domicile of such person.

And now having fully answered, respondent prays to be *be* hence dismissed.

87 A. H. KORTRECHT,
FITZHUGH & BIGGS,
Solicitors for Def't.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me Thos. A. Evans, a duly commissioned Notary Public, in and for said State, Mrs. Josephine Whitley, who being duly sworn states that the matters set forth in foregoing answer are true to the best of her knowledge, information and belief.

JOSEPHINE WHITLEY.

Sworn to and subscribed before me this 31st day of M'ch, 1910.

THOS. A. EVANS,
Notary Public.

Agreement.

In the Probate Court of Shelby County, Tennessee.

In re Estate of A. P. WHITLEY, Deceased.

Agreement.

In this cause, it is agreed by and between counsel for Josephine Whitley, Adminisratrix, and Elizabeth Whitley, that the following facts are true:—

First. All of the admissions and averments in the first, second, third and fourth paragraphs of the answer of Josephine Whitley, administratrix, are true.

Second. Neither Petitioner, Elizabeth Whitley, nor decedent A. P. Whitley, was a resident of the State of Idaho, at the time of the latter's death, nor was either of them ever a resident of said state.

88 Third. Josephine Whitley, as Administratrix, made settlement with the railroad Company in her capacity as administratrix of said Whitley, deceased, who was a resident of Tennessee at the time of his death, and that said settlement was made under the direction and approval of this court.

Fourth. Sub-section 2 of section 5702 of the Revised Codes of Idaho reads as follows:—

"The provisions of the preceding sections of this chapter, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedent."

Fifth. That A. P. Whitley died without issue.

Sixth. The amount of compromise settlement effected with the Railroad Company causing the death of A. P. Whitley, was the sum of Eleven Thousand Dollars ($11,000.00) and such compromise settlement was made under the authority of and duly approved by this Court.

Seventh. That the said Josephine Whitley and A. P. Whitley were married January 24, 1904, in the State of Texas, and that the facts stated in Paragraph beginning at the bottom of page four of the answer herein, and beginning with the words "and for further

answer" and ending with the words "has greatly impaired her health," on page 5 of said answer are true.

Eighth. That the amount of property left by the said decedent is shown by the inventory filed herein.

Ninth. That Mrs. Elizabeth Whitley was not dependent on the decedent, A. P. Whitley, and was, at the time of his death, and still is, and for sometime prior to said death, had been living in the State of Texas; that A. P. Whitley did make gifts, in some small amounts, to the said Elizabeth Whitley; that the father of said Elizabeth is eighty years of age, and is a man of large
89 means, and Mrs. Elizabeth Whitley also has a son and daughter living in Texas, who are able to contribute to her support.

Tenth. That the proceedings referred to in the answer of Josephine Whitley, Administratrix, as having taken place in Idaho; and in Washington, were had as appears from the certified copy thereof attached to said answer.

Eleventh. That the foregoing agreed facts may be received in evidence in the same manner and to the same extent as if they were proven in the usual and ordinary way, subject to such exceptions as may be made by either party as to relevancy or competency of such facts.

Twelfth. That either party may offer and use, upon the trial of this cause in this Court, and in any other Court to which this case may be carried, the printed copy of the Revised Codes of Idaho, prepared by John F. MacLane, Code Commissioner, and published in the year 1908 by Syms, York Company, printers and binders, of Boise, Idaho, and containing two volumes. In the event of this case being carried to the Court of Civil Appeals or to the Supreme Court of Tennessee, it is further agreed that either party may use said Codes upon the hearing of said cause in said higher Court or Courts, and the necessity for having the same, or any part thereof, transcribed into the record, is hereby expressly waived.

FITZHUGH & BIGGS &
FRANK S. ELGIN,
For Josephine Whitley, Admr.
CAREY & ROGERS,
For Petitioner, Elizabeth Whitley.

90 Probate Court of Shelby County.

STATE OF TENNESSEE,
Shelby County, ss:

Pleas Before the Honorable J. S. Galloway, Judge of the Probate Court of Shelby County, Held in the City of Memphis and State and County Aforesaid and at the March Term thereof, 1910.

Be it remembered, that on to-wit. 1st day of April, 1910 it being one of the days of said March 1910 Term, the following appears of record in the words and figures, viz:

No. 14279, R. D.

In re Estate of A. P. WHITLEY, Dec'd.

This cause came on to be heard on the original and amended and supplemental petitions of Mrs. Elizabeth Whitley and the answers of Mrs. Josephine Whitley and the exhibits thereto, including exemplified copies of proceedings from the Courts of the States of Idaho and Washington, and also upon the agreed state of facts.

From all of which, after full argument by counsel for both sides and due consideration of the court, it appears to the satisfaction of the court that the petitioner, Mrs. Elizabeth Whitley has no interest in the fund which was paid over to Mrs. Josephine Whitley as administratrix as a compromise settlement of her claim and suit as such administratrix in the Supreme Court of the State of Washington for the death of her husband in the state of Idaho. That said fund belongs to the said Josephine Whitley as the widow and sole heir and distributee of said A. P. Whitley dec'd and that petitioner is not entitled to any of the relief prayed for in her said petition.

91 It is accordingly so ordered adjudged and decreed by the Court. It is further ordered and adjudged that the original and amended and supplemental petitions be and the same are hereby dismissed at the costs of petitioner and that Josephine Whitley as administratrix, have and recover of the said Elizabeth Whitley and R. P. Cary as surety on her cost bond, and all the costs of this proceeding, for which let execution issue.

From all of which the said Elizabeth Whitley prays an appeal to the next term of the Supreme Court, at Jackson Tennessee, which appeal is granted upon the execution of an appeal bond in an amount required by law.

92 STATE OF TENNESSEE,
Shelby County, ss:

I, Thos. B. Crenshaw, Clerk of the County and Probate Courts of said County, do hereby certify that the foregoing nineteen (19) pages contain a full, true and perfect copy of the Petition, Amended & Supplemental Petition, Answer and Order on same and Agreement of Counsel, as the same appears of record in and now on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at office in the city of Memphis, this 11 day of June, 1912.

[SEAL.] THOS. B. CRENSHAW, *Clerk.*

STATE OF TENNESSEE,
Shelby County:

Probate Court Room.

MEMPHIS, TENN., June 11, 1912.

I, J. S. Galloway, sole and presiding Judge of the Probate Court of said County, certify that Thos. B. Crenshaw, who gave the foregoing Certificate, is now, and was at the time of signing the same, Clerk of said Court, and that said Court is a court of Record and that his attestation is in due form, and his official acts, as such, are entitled to full faith and credit.

Witness my hand this 11 day of June, 1912.

J. S. GALLOWAY, *Judge.*

STATE OF TENNESSEE,
Shelby County:

I, Thomas B. Crenshaw, Clerk of the Probate Court of said County, certify that Hon. J. S. Galloway, whose genuine official signature appears to the above and hereto annexed Certificate, is and was at the time of signing the same, sole and presiding
93 Judge of the Probate Court in and for the County and State aforesaid duly commissioned and qualified, and that all his official acts, as such, are entitled to full faith and credit.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at office, in the city of Memphis, this 11 day of June, 1912.

[SEAL.] THOS. B. CRENSHAW, *Clerk.*

94 DEF'T'S EX. 4.

THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State for the Western Division Thereof, at the April Term, A. D. 1910.

Present: The Hon. W. D. Beard, Chief Justice, and B. D. Bell, W. K. McAlister, M. M. Neil, and Jno. K. Shields, Associate Judges, when the following proceedings were had, to-wit:

July 14, 1912.

#43, Shelby Chancery Docket.

In re A. P. WHITLEY ESTATE.

This cause was heard before the Supreme Court of Tennessee on the transcript of the record from the Probate Court of Shelby County, Tennessee, the assignments of error by the appealant and the reply of the appellees thereto.

And this case having been argued by counsel both orally and by printed brief, the Court is of opinion and doth so adjudge that there is no error in the judgment entered in the Probate Court of Shelby County, Tennessee; that it was properly adjudged in said probate court that Mrs. Josephine M. Whitley, as widow of A. P. Whitley, deceased, is alone entitled to the fund of Eleven Thousand ($11,000.00) Dollars received by her as administratrix in the settlement of the claim and judgment against the railroad company for the wrongful death of her said husband; that said fund is to be distributed in accordance with the laws of the State of Tennessee, and not the laws of the State of Idaho; that petitioner, Mrs. Elizabeth Whitley, the mother of A. P. Whitley, deceased, has absolutely no interest of any kind or character in said fund and no right to any part of the proceeds of recovery for the death of the said A. P. Whitley.

95 It is accordingly ordered, adjudged and decreed by the Court that the judgment of the Probate Court of Shelby County Tennessee, be and the same is in all respects affirmed, and that appellee, Mrs. Josephine M. Whitley administratrix, have and recover of appellant, Mrs. Elizabeth Whitley, and Rhea P. Cary and Frank M. Rogers, the sureties on appeal bond, all the costs of this cause, for which let execution issue.

STATE OF TENNESSEE,
Madison County:

Supreme Court for the Western Division.

I, T. B. Carrol, Clerk of the Supreme Court of Tennessee, for the Western Division thereof, do hereby certify that the foregoing decree is a full, true and complete copy as appears of record on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of this Court, at office in the City of Jackson, this the 21 day of June, 1912.

[SEAL.] T. B. CARROL, *Clerk.*

STATE OF TENNESSEE,
Madison County:

SUPREME COURT ROOMS,
JACKSON, TENN., — 191—.

I, John K. Shields, Chief Justice of the Supreme Court of the State of Tennessee, certify that T. B. Carroll, who gave the foregoing certificate is now, and was at the time of the signing of the same, Clerk of said Court, and that the said Court is a Court of Record, and that his attestation is in full faith and credit.

Witness my hand, this the 21st day of June, 1912.

[SEAL.] JOHN K. SHIELDS,
Chief Justice.

96–106 STATE OF TENNESSEE,
Madison County:

I, T. B. Carroll, Clerk of the Supreme Court of said State, certify that the Hon. Jno. K. Shields, whose genuine official signature appears to the above and hereto annexed certificate, is and was at the time of signing, Chief Justice of the Supreme Court of Tennessee, and that all his official acts as such are entitled to full faith and credit. In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at office in the City of Jackson, this the 21st day of June, 1912.

[SEAL.] T. B. CARROLL, *Clerk.*

* * * * * * *

107 In the District Court of the Eighth Judicial District of the State of Idaho in and for Kootenai County.

MARY ELIZABETH WHITLEY, Plaintiff,
vs.
SPOKANE AND INLAND EMPIRE RAILWAY COMPANY, Defendant.

Transcript of Evidence.

John P. Gray, for Plaintiff.
Frank Graves and E. R. Whitla, for Defendant.
Case tried at Cœur d'Alene, Kootenai County, Idaho, September, 9th, 1912.

Received from the Court Reporter and lodged with me this 30th day of Oct. 1912.

D. E. DANBY,
Clerk District Court,
By EMIL ELDER,
Deputy.

Received from the Court Reporter and lodged with me this 7th day of Nov. 1912.

D. E. DANBY,
Clerk District Court.

108 (GRAY:) Mr. Graves, do I understand that you admit negligence?

(GRAVES:) I don't know that I want to admit negligence. I will say that we will require no proof upon the question of the company's liability for the accident occasioning the death of Mr. A. P. Whitley, deceased. I believe that is all you want?

(GRAY:) I desire to offer in evidence the deposition of Mrs. Mary Elizabeth Whitley. It is not necessary to read the stipulation for taking the deposition?

(COURT:) No.

(Here follows deposition in words and figures following:)

Mrs. ELIZABETH WHITLEY, being duly sworn, testified as follows:

Q. State your name is full.
A. Mary Elizabeth Whitley.
Q. What is your present place of residence?
A. Thornton, Texas.
Q. You may state what relation you are to A. P. Whitley, deceased?
A. I am his mother.
Q. State the age of A. P. Whitley, deceased, at the time of this accident which caused his death?
A. He was thirty three years old.
Q. State whether or not he was a married man?
A. Yes, he was a married man.
Q. State whether or not you knew or was acquainted with his wife?
A. Yes sir, I was.
Q. State how and when your son A. P. Whitley received the injuries which resulted in his death?
109 A. The 31st of July, 1909.

Defendant objects on the ground that it is hearsay, and it is not shown that she knew it of her own knowledge.

Q. You stated when the accident occurred which resulted in his death?
A. Yes, sir.
Q. What was the condition of your son, A. P. Whitley's health at the time of the accident?
A. He was in good health.
Q. And preceding this accident when you last saw him?
A. He was in good health, he was always in good health.
Q. What was his occupation?
A. He was an attorney at law.
Q. State, if you know, what his standing as an attorney was?
A. He was in good standing.

Defendant objects on the ground that it calls for an opinion of the witness.

Q. When did you last see your son?
A. The 23d day of June, 1909.
Q. Prior to his death in Idaho?
A. Yes, sir.
Q. Did you have any conversation with him at that time?
A. Yes, sir.
Q. In regard to his business affairs?
A. Yes, I talked a good deal about his business.
Q. Did he state at that time to you, or did you at the time he visited you, discuss what his practice was and what his income from his practice amounted to substantially?

Objected to as incompetent, irrelevant and immaterial and hearsay.

110 Objection sustained. Exception.

(The following objection also in the original deposition.)

"Defendant objects, it is a self-serving declaration, and it is immaterial and irrelevant."

A. His income was between $2,500.00 and $3,000.00 a year at that time.

Q. When did your husband die, when did his death occur?

A. Twenty-seven years ago last December; it was in 1884.

Q. You may state on whom you depended for support since the death of your husband?

A. On my son.

Q. State whether or not, what the facts are since that time as to his rendering you financial assistance and support?

A. He was depended on almost wholly for a support, because I looked to him for support.

Q. Did he contribute any means, any money to your support?

A. He did.

Q. Will you state what amounts, and in what way he contributed towards your support?

A. Well, he would send all the way from $5.00 up to as much as $135.00; sometimes it would be $10.00, $20.00. Sometimes he would send a small amount in a letter, and sometimes it would be a draft or a check.

Q. Did he have any regular time for sending you money?

A. No, sir.

Q. Or other means of your support?

A. No, sir, he just sent it from time to time just whenever I needed it or when he had it to spare.

Q. Have you any property?

111 A. No, sir.

Q. Of your own?

A. No, sir.

Q. Either real or personal?

A. No, sir.

Q. You may state whether or not you have any means with which to support yourself, and did have at the time of A. P. Whitley's death, and prior thereto?

Objected to as incompetent, irrelevant and immaterial; Offering no criterion for the measure of damages.

Sustained. Exception.

A. No, sir, I was dependent upon him, I didn't have any support only through him.

Q. State whether or not it is a fact that he has constantly contributed funds to your support since the death of your husband, up to the time of the accident which resulted in his death?

Objected to as leading and suggestive, calling for a conclusion. Witness has already stated just what he did do. She has stated in answer to a previous question what amounts he sent and how he sent it.

(COURT:) It is somewhat leading but I will over rule the objection.

Exception.

A. Yes, he has constantly supported me, I was dependent on him because he was the oldest, and we looked to him; he was our adviser, and I was dependent on him.

Q. You said that you were acquainted with A. P. Whitley's wife, Josephine Whitley?

A. Yes, sir.

Q. State if you know whether there was any issue of that marriage, that is the marriage of your son A. P. Whitley and
112 Josephine Whitley, state whether or not there were any children of that marriage?

A. No, sir, there wasn't any children.

Q. State whether or not you are the sole surviving parent of said A. P. Whitley?

A. I am.

Q. State whether or not you were ever notified in any manner in regard to a suit brought by Josephine Whitley against the Spokane & Empire Railway Co. a corporation, in the State of Washington, for damages for the wrongful death of your son A. P. Whitley?

Objected to as immaterial and irrelevant whether she was or was not notified.

Overruled. Exception.

A. No, I never had any knowledge of it at all.

Q. When did you first learn that such a suit had been instituted and that judgment had been rendered in favor of Josephine Whitley, and that judgment had been satisfied in the case?

A. It was through my attorney, Robert H. Elder.

Q. Was that the first notice of any kind that you had of the pendency of that action?

A. Yes, sir.

Q. You may state what the relations were between yourself and son as to his interest in your welfare?

A. Well, I could say this; there never was a more loving, thoughtful and self-sacrificing son than he was. He was always so mindful of me, he never left the room, no matter what kind of work he was doing without kissing me good-bye, and he always kissed me good night; and when he was away preparing himself for the law I received a letter every week from him, and sometimes two and three times a week. It seemed that he was always so mindful of me in my affliction, he never was negligent of me at all.

113 Q. After your son's marriage state what the conditions were as to his contributing to your support?

A. Well, I continued to live with him after his marriage, and it was the same, he supported me and never neglected me at all. He helped me the same after he married as he did before, and continued on to help me.

Q. State, if you know what the facts are, as to whether or not Josephine Whitley, the wife of A. P. Whitley, respects and recog-

nizes your rights or interest in the action given by the statutes of the State of Idaho for the wrongful death of your son A. P. Whitley?

Objected to as incompetent, irrelevant and immaterial it cannot make any difference whether she does or does not. If the plaintiff had rights in that recovery that the administrator secured, she had them whether the administrator admitted it or not.

Overruled. Exception.

A. She did fail to recognize me and my rights.

Q. You may state if you have lived with your son A. P. Whitley?

A. Yes, sir.

Q. For how long, during what years after his marriage?

A. I lived with him about two years after his marriage, and then he went to study law.

Q. State whether or not prior to his leaving this state you had a conversation with him in regard to your care and support?

(Objection in the deposition.) "Defendant objects, it is immaterial and irrelevant."

Objected to as incompetent, irrelevant and immaterial and hearsay.

Overruled. Exception.

A. Yes, sir, I did.

114 Q. Where and when was the conversation had, if you know?

Same objection. Overruled. Exception.

A. Well it was in the fall of 1906, in September just before he started to Lebanon, Tennessee.

Q. Did you answer where you were at that time?

A. I was in Waxahachie.

Q. You may state what was said at that time?

(Objected to as incompetent, irrelevant and immaterial, self-serving declaration; 1906 is three years before the accident occurred.

Overruled. Exception.

A. Well, he said that I could make my home with this son, but he would continue to contribute to my support.

Q. State what the facts are as to whether he did so?

A. He did.

Cross-examination:

Q. How old are you?

A. Fifty-seven years.

Q. How long have you lived in Thornton?

A. I don't remember the year we came here.

Q. How long have you been in this state?

A. About thirty-four years.

Q. What state did you come from?

A. Arkansas.

Q. How many children have you living.

A. Just two.

115 Q. A. P. Whitley was one and S. H. Whitley is another?
A. Yes, and Mrs. Fowler.
Q. You have two living and one dead?
A. Yes, sir.
Q. Is S. H. Whitley your son?
A. Yes, sir.
Q. What business is he engaged in?
A. He is a school teacher.
Q. What position does he hold now?
A. He is still a teacher.
Q. What position does he now hold?
A. Principal of Corsicana High School.
Q. Where does your daughter live?

(In the deposition:) "Plaintiff objects, it is immaterial."

A. She lives east of Thornton here.
Q. Do you live with her?
A. I live with her about half of the time and with my son about half of the time.
Q. With your son S. H. Whitley about half the time?
A. Yes, until she married I made my home entirely with him, but when she married I lived with her part of the time.
Q. How long has she been married?
A. Four years.
Q. And you visit her part of the time?
A. Yes, I visit her some, but I made my home practically with my son S. H. Whitley, and for the last year I have divided my time.
Q. Does your son S. H. Whitley contribute any thing to your support?

(Objected to as immaterial. Sustained. Exception.

A. Yes, sir.
116 Q. Did S. H. Whitley, prior to the death of A. P. Whitley, contribute anything to your support?
A. He didn't contribute anything because he was in school preparing himself, and I was depending upon A. P. Whitley.
Q. After S. H. Whitley got out of school and began teaching, I will ask you if he didn't contribute something to your support then?
A. Well, he taught to get money to go to school on.
Q. How long since he went to school?
A. To the best of my knowledge it was about six or seven years ago, and he has gone off and taken some special work since then.
Q. Does your daughter contribute anything to your support?

Objected to as immaterial.
(COURT:) I think in view of your testimony to that effect in the examination in chief possibly this would be competent. I will overrule the objection.
Exception.

A. Yes, she helps her brother support me.

Q. Did she prior to the death of your son A. P. Whitley?
A. No, sir.
Q. Your daughter and son both are in good health?
A. Yes, sir.
Q. Are they in reasonably good financial circumstances?

Objected to as immaterial.
(COURT:) I think she may answer that.
Exception.

A. Well, they are just reasonably so.
Q. I will ask you if you have yourself at any time contributed anything to your children's help financially?
A. No, sir.
Q. Did you ever give any of your children any property?
A. No, sir, I never had anything left.
117 Q. You have had no property in recent years of any character?
A. No.
Q. In the way of land or money?
A. Not that I remember of. My sons bought a lot in Tehuacana, Texas about twelve years ago, which was later sold and the money divided between them. This property might have been in my name.
Q. When was the last time you saw your son?
A. It was the 23rd of June, 1909.
Q. That was when you were summoned there?
A. No, sir, he made me a visit just before he was killed.
Q. How often did he visit you?
A. That was the only time.
Q. Up to the time he saw you about a month prior to his death, how long had it been since you had seen him?
A. Nearly four years.
Q. During that period of time where did he live?
A. He went to Lebanon, Tennessee, and took a law course, and then he located in Memphis, Tennessee.
Q. How long had he been practicing law?
A. Three years.
(In the deposition:) "Plaintiff objects, immaterial."
Q. You answered that he contributed quite a good deal to your support; I will ask you how long prior to his death had it been since you had received any money from him?
A. He gave me money just before he left.

(Plaintiff objects."

Q. Before he left to go back?
A. Yes, sir, to Memphis.
Q. What sum did he give you?
A. Do you mean before he went back to Memphis or before he went back to his home?
118 Q. Before he went back to his home?
A. When he made me the visit?
Q. Yes, was that the time he gave you the money?

A. What I had reference to was when he started to go to Lebanon.
Q. When was that?
A. In 1906.
Q. Was that the last money he gave you?
A. No, sir.
Q. When was the last time that he ever sent you or gave you any money?
A. I don't remember the exact date.
Q. Well, just approximately what year?
A. Well, he contributed money to me just a short time before his death.

(In the deposition:) "Plaintiff objects to all this."

Q. In a letter?
A. It was a personal check.
Q. For what amount of money?
A. I don't know, he sent me money just all along, he didn't have any regular date.
Q. I would like for you to recall the exact date, the last date and the amount, if you can state it just say so?
A. I think he sent me $40.00.
Q. What year was it in?
A. That was in 1909.
Q. You think the last remittance he made you was about $40.00?
A. Yes, I don't remember the exact amount.
Q. That was in a personal check?
A. I don't remember whether the last he sent me was a check or a draft, I think it was a check.

119 Q. Now, during that same year of 1909, what other sums did he send you?

A. Well he would send me sometimes $20.00 and $5.00 or $10.00, and one time, of course it was before that, it was $135.00.
Q. Was that during 1909?
A. No, it was during the four years he was away.
Q. Could you give an approximate idea about the number of dollars of money he sent you during the four years he was away?
A. No, sir, I couldn't give you that.

(Plaintiff objects.)

Q. Will you just approximate in round numbers in order to give some idea?
A. I don't know whether I could or not, I didn't keep any account of it.
Q. Did he send you as much as three or four hundred dollars?
A. Yes, he sent me more than that.
Q. During 1909 did you receive any money from S. H. Whitley or your daughter?
A. No, sir.

"Plff. objects as immaterial" (In deposition).

Q. Who have you depended upon for a support since the death of your son?

A. I depend upon my son S. H. Whitley and Mrs. Fowler.
Q. Have they contributed to your support since that time?
A. Yes, sir.

"Plaintiff objects."

Q. About how often did you hear from your son the last year he was away?
A. I heard from him every week, and sometimes two or three times a week, during the whole four years that he was gone. I never failed a week while he was gone unless the letters were delayed, he wrote regularly every week.
120 Q. Did you go to his burial?
A. No, sir.

"Plaintiff objects as immaterial and irrelevant."

Q. Did you get a notification of his death?
A. Yes, sir.
Q. You didn't have time to go?
A. No, sir, I wasn't able.
Q. I didn't know until just then, you spoke of your daughter marrying Mr. Fowler, was it Eugene Fowler?
A. Yes, sir.
Q. I will ask you just in an approximate way, state how much Mr. Fowler and your daughter are worth financially?

Objected to as incompetent, irrelevant and immaterial.
Overruled. Exception.

A. I don't know.
Q. Well they have land?
A. Yes, sir.
Q. And personal property?
A. I don't know anything about his business.
Q. Would it reasonably be $8,000.00 or $10,000.00?
A. I don't know.

(In deposition:) "Plaintiff objects to all of these questions."

Q. You never heard him say? About how many acres of land has he?
A. I don't know anything about that. I don't know anything about his affairs.
Q. Has he got a good many cattle?
A. I don't know how many cattle he has, because quite a good many died off last year, and I haven't heard him say anything about that.
Q. Has either your son, S. H. Whitley, or your daughter Mrs. Fowler refused to contribute anything to your support, the
121 necessities of your support, since the death of your son A. P. Whitley?
A. No, sir.

(In deposition:) (Plaintiff objects, immaterial).

Q. What is the estimated value of your son S. H. Whitley's property?

Objected to as incompetent, irrelevant and immaterial.

A. About $1,200.00, the assessed valuation.
Q. What is the size of Corsicana?
A. About ten thousand people.

Redirect examination:

Q. Please state the reason that you did not go to the burial of your son?
A. I wasn't able to go, my health was so bad I couldn't stand the trip.
Q. State whether you were under a doctor's care at that time?
A. Yes, the shock was so great.
Q. Have you in your possession, at the present time, any of the letters that you spoke of on cross examination, written by your son, in your possession now?
A. Well I think I have some of them. I accumulated so many, and when he visited me he said not to let them accumulate so, and to burn them, and I burned some of them, but since his death all of the letters I could find I kept. I haven't a great many of them, I destroyed them. I have a part of them but I haven't all of them, that is what I mean. I have some of them with me here.
Q. When did your daughter marry Mr. Fowler?
122 A. About four years ago.
Q. Did Mr. Fowler, at any time prior to your son's death, contribute to your support in any way?
A. No, sir.
Q. State whether or not Mr. Fowler or your daughter contributed to your support prior to your son A. P. Whitley's death in any manner at all?
A. No, sir they didn't.
Q. Is your son, S. H. Whitley, married?
A. Yes, sir.
Q. State how many children if any, he has?
A. Two children.
Q. State, if you know, whether he has any other property other than the home in which he is living in Corsicana?
A. He has none.
Q. State, if you know, whether he has any other income other than his salary as principal of the Corsicana High School?
A. He has none.
Q. State, if you know, whether your daughter, Mrs. E. J. Fowler, has any children?
A. Yes.
Q. How many?
A. One child.

(Signed) MARY ELIZABETH WHITLEY.

(Plaintiff rests.)

(WHITLA:) Now, at this time, the defendant, the Spokane Inland Empire Railway Co., moves the court that this case be dismissed and that this court refuse to hear any further testimony in this case and that judgment be rendered herein in favor of the defendant the Spokane Inland Empire Railway Co. for the reason and upon the grounds that the evidence adduced in this
123 case is not sufficient to show any liability whatever on behalf of the defendant, and for the further reason that the testimony adduced by the plaintiff shows that the right of action sued on in this action is a joint right of action which must be prosecuted by the plaintiff and Josephine Whitley jointly, and which cannot be prosecuted by either one of those parties without the other party being properly before the court, and that Josephine Whitley is not now and never has been properly brought before this court by any proceeding whatever, and is not now a party to this action, other than a formal party, having been made so by the plaintiff, and is a necessary party to this proceeding before any judgment can be rendered herein whatever.

(COURT:) You admit the company's liability for his death and claim it has been satisfied?

(GRAVES:) Yes; we will come in with our testimony.

(COURT:) Claim it in your pleadings?

(GRAVES:) Yes. Outside of this, we are claiming that plaintiff cannot prosecute this suit without Josephine Whitley.

(COURT:) Do your wish to argue this matter?

(WHITLA:) No sir, just make it to save the record.

Motion denied. Exception.

(GRAVES:) Will you stipulate with me that the Superior Court of the State of Washington in and for the county of Spokane is a court of original jurisdiction?

(GRAY:) Yes.

(GRAVES:) Having original jurisdiction of all actions that are triable in the courts of that state?

(GRAY:) Yes.

(WHITLA:) I now offer in evidence the record of the case
124 of Josephine M. Whitley as administratrix of the estate of A. P. Whitley deceased, vs. The Spokane Inland Empire Railway Co.

(GRAY:) Objected to for the reason that it is incompetent, irrelevant and immaterial; there is nothing showing that Josephine M. Whitely had any authority to commence an action in the courts of the State of Washington as the administratrix of the estate of A. P. Whitley, deceased. On the contrary the record shows that Josephine M. Whitley was foreign administrator and as foreign administrator she would have no right to sue, our own law being such that a foreign administrator cannot maintain an action in the courts of this state without taking out ancellary letters of administration and the presumption being that the laws of Washington are identical with the laws of this state; and that it is not material. That the record in that case shows that the present suit was commenced prior to the action commenced by Josephine Whitley and

the admission of the defendant that Josephine Whitley declined and refused to become a party to this suit and has refused to come within the jurisdiction of this court and submit herself to the jurisdiction of this court.

(COURT:) I will overrule the objection and admit this record to be considered in the matter.

(Record marked Defts. Ex. 1.)

(GRAVES:) I now offer in evidence, if it please the court, a properly authenticated copy of the record of the Probate Court of Shelby County, Tennessee, appointing Mrs. Josephine M. Whitley as administratrix of the estate of A. P. Whitley, deceased, and certificate qualifying her as such.

(GRAY:) Objected to on the same grounds; it gave no authority to sue.

125 Overruled. Exception.

(Paper marked Defts. Ex. 2.)

(GRAVES:) I next offer in evidence properly authenticated copies of the proceedings in the estate of A. P. Whitley in the Probate Court of Shelby County on the petition of Mrs. Elizabeth Whitley, the plaintiff in this case, being petitions, judgment of court and final decree of the court, etc.

(GRAY:) Objected to as incompetent, irrelevant and immaterial, stating no defense, and for the further reason that this court will take no notice of the decree of a foreign court based upon the law of this state and upon a recovery permitted under the law of this state when the foreign court refuses to enforce and recognize the policy of the law of this state and declines to enforce the law of this state governing the distribution of any moneys that may be recovered even though that money had been properly recovered.

Overruled. Exception.

(Paper marks- Defts. Ex. 3.)

(GRAVES:) I now offer in evidence certified copy of the Judgment of the Supreme Court of the State of Tennessee in the same cause as the last exhibit.

(GRAY:) Objected to as incompetent, irrelevant and immaterial and upon the further ground that it is a judgment which pretends to distribute some sum which is alleged to have been recovered under the laws of the State of Idaho, and under that judgment it is intended to distribute it not in accordance with the laws of Idaho and the policy of the laws of the State of Idaho, but contrary thereto.

Overruled. Exception.

126 (Papers marked Def't's Ex. 4.)

It is stipulated between counsel that this court, the Supreme Court of the State, in case this case should be removed there, and any other court to which the case may be carried, may take judicial notice of the statutes and of the decisions of the Supreme Court of the State of Washington, upon any question in this case, and for that purpose they may look to the published statutes and to the published reports of the decisions, either in the Washington

Reports themselves or in the Pacific Reporter or any other recognized reporter.

(GRAVES:) Of either the State or Territory of Washington?

(GRAY:) Yes.

(GRAVES:) There is one other item of proof perhaps I ought to make and that is that the Josephine M. Whitley and A. P. Whitley and Mrs. Mary Elizabeth Whitley mentioned in the exhibits offered by the defendants are respectively the same three persons mentioned in the pleadings in this case.

(GRAY:) Yes.

(Mr. GRAVES makes a statement of what the exhibits show.)

(GRAVES:) The judgment was discharged.

(GRAY:) No part of it withheld.

(GRAVES:) Not a cent; paid in full without any conditions or any strings on it whatever. The judgment was satisfied.

(WHITLA:) The judgment mentioned in Def't's Ex. 1.

(GRAVES:) The judgment mentioned in Def't's Ex. 1 was fully satisfied at its face value, cash.

(GRAVES:) Mr. Kizer also states that at the time of his death A. P. Whitley was a citizen of the State of Tennessee, Shelby County.

(GRAY:) Yes, I admit it.

127 (GRAY:) There is a contract referred to, between Mrs. Whitley and the defendant company.

(GRAY:) I don't think it was ever in writing. If it was I have not had it in writing.

(GRAVES:) What I want to know is if this contract was entered into prior to the time Mrs. Whitley was appointed administratrix in Tennessee.

(GRAVES:) No, I think not. I will tell you—(Makes statement).

(GRAY:) You will agree that whatever your complaint and answer in the Spokane case, states in regard to that agreement is the correct date?

(GRAVES:) Yes.

(Defendant rests.)

(WHITLA:) I wish to renew the motion made at the commencement of the plaintiff's testimony.

(COURT:) Motion denied.

Exception.

128 STATE OF IDAHO,
Kootenai County, ss:

I hereby certify that the foregoing transcript of evidence is a true and correct copy or transcript of the shorthand notes taken by me of all the testimony taken in the case of Mary Elizabeth Whitley vs. Inland Empire Railway Company, including all motions and objections, the rulings of the court thereon and exceptions to said rulings, and the same is correct to the best of my knowledge and belief.

M. D. BARSTOW,
Court Reporter of the Eighth Judicial District of Idaho, under Judge R. N. Dunn.

129–132 (Title of Court and Cause.)

Order Settling and Certifying Transcript of Evidence.

In this action it appearing to the court from the admission of the service of the transcript of evidence herein that the transcript of the evidence has been duly and regularly served upon Elder & Elder and John P. Gray, attorneys for plaintiff in this action, and all parties having agreed in open court that said transcript is true and correct transcript of the evidence herein, and no errors having been designated by either party, and the parties hereto having agreed in open court that said transcript should be settled and certified as true and correct:

Now, Therefore, I, R. N. Dunn, Judge who tried the above entitled action, do hereby certify that the foregoing transcript is a full, true, correct and complete transcript of all the evidence and proceedings submitted in said action, except the objections which are therein referred to, and said transcript of evidence is hereby settled as a full, true, correct and complete transcript of the evidence and proceedings in said cause in accordance with the provisions of paragraph III of Section 4434 of the Revised Codes of the State of Idaho.

Dated this 15th day of November, A. D. 1912.

R. N. DUNN,
District Judge.

* * * * * * *

133 *Record Entries.*

In the Supreme Court of the State of Idaho.

CŒUR D'ALENE, IDAHO, March 25, 1913.

No. 2165.

MARY ELIZABETH WHITLEY, Respondent,
vs.
SPOKANE & INLAND EMPIRE R. R. Co., Appellant.

Ordered that this case be set for hearing on Saturday at ten o'clock A. M.

CŒUR D'ALENE, IDAHO, March 29, 1913.

No. 2165.

MARY ELIZABETH WHITLEY, Respondent,
vs.
SPOKANE & INLAND EMPIRE RY. Co., Appellant.

This cause having been heretofore set for hearing, now on this day the same was called, Will G. Graves and Ezra Whitla appearing

for appellant, and John P. Gray and Robert H. Elder appearing for respondent. After argument the cause was submitted and by the court ordered taken under advisement.

BOISE, IDAHO, April 14, 1913.

No. 2165.

MARY ELIZABETH WHITLEY, Respondent,
vs.
SPOKANE & INLAND — RAILWAY CO., Appellant.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Chief Justice Ailshie, to the effect that the judgment of the District Court be affirmed.

134 It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Eighth Judicial District in and for the county of Kootenai in the above entitled cause be and the same hereby is affirmed, with costs in favor of respondent.

Ordered that this court do now adjourn until ten o'clock tomorrow morning.

135 In the Supreme Court of the State of Idaho, Cœur d'Alene, March Term, 1913.

Filed April 14, 1913. I. W. Hart, Clerk.

MARY ELIZABETH WHITLEY, Respondent,
vs.
SPOKANE & INLAND — RAILROAD CO., Appellant.

Opinion of the Court.

Death by wrongful act—action by personal representative—parties beneficiaries under judgment—action in foreign jurisdiction—exclusion of heir in foreign Jurisdiction—foreign judgment—authority of foreign administratrix—full faith and credit due foreign judgments—ratification—election of remedies.

1. Where an administratrix, appointed under the laws of one foreign jurisdiction, sued in another foreign jurisdiction for recovery on a death claim arising under the death statute of Idaho (Sec. 4100, Rev. Codes), and the courts of the state of her appointment hold that she was not a representative of and had no authority to represent the mother of the deceased, who was not an heir of the deceased under the laws of the state where the administratrix was appointed, held; that in an action by the mother in the courts of Idaho, where the mother is one of the heirs of the decedent, failure to make the administratrix, either officially or personally, a party

plaintiff or defendant is not prejudicial error and is not fatal to the jurisdiction or to a judgment recovered in such action.

2. In order to bind or estop a party under the doctrine of ratification, he must have accepted some benefit under or shared in the fruits of a judgment or other action or proceeding which he
136 is supposed to have ratified and in some way to have by his action placed the party urging and pleading the ratification in a worse or more unfavorable position than he was or would have been in had no such action been taken by the party against whom estoppel by ratification is charged.

3. In order to apply the doctrine of election of remedies to a party, he must actually have had at command two inconsistent remedies. He must not only have thought he had such remedies, but must have in fact had them available. To pursue a supposed remedy which the court holds to be no remedy at all and not to be available to the party is no bar to subsequently pursuing an available remedy.

4. The constitution of the United States, sec. 1, art. 4, and sec. 905 of the Revised Statutes of the United States, command the courts of every state of the Union to give to the judgments and judicial proceedings of the courts of every other state the same faith and credit which such judgments and proceedings are accorded by the courts of the states respectively in which such judgments were entered and such proceedings were had.

5. Sec. 4100 of the Rev. Codes of this state authorizes the prosecution of an action by "the heirs or personal representatives" of a deceased person against a person wrongfully causing the death of such person, and any judgment obtained in such an action inures to the benefit of the "heirs" of the decedent and in no case becomes a part of the assets of the estate of the deceased. Where there are no heirs, the action cannot be maintained.

6. Where a death has been wrongfully caused in this state, the prosecution of an action in a foreign state under the authority of sec. 4100, Rev. Codes, of this state, and alleging the accrual
137 of the cause of action in the state of Idaho under this statute and the prosecution of such action for the benefit and in behalf of a part only of those who are "heirs" under the laws of the state of Idaho, is not a bar to the subsequent prosecution of an action in this state by such heir as was not represented in the action in the foreign jurisdiction, and to deny the right of such a judgment entered in a foreign jurisdiction to bar and preclude an omitted and non-represented heir to thereafter prosecute an action in this state does not deny such full faith and credit to such foreign judgment as is commanded by the federal constitution and the act of Congress thereunder.

7. A recovery in a foreign state under the death statute of Idaho, authorizing such an action for a wrongful death in this state, does not bar a recovery in this state by an- one who is an heir under the laws of Idaho and who was barred from participating as an heir under the laws of the foreign state and who was not represented in the action wherein the recovery was had.

8. Neither of the judgments pleaded in this case constitutes a bar to the right of recovery in this action. The Tennessee judgment would not be a bar to a right of recovery in that state, on the ground a recovery had once been had but simply for the reason that the court there holds that no recovery at all could be had in that state by the respondent herein, Mary Elizabeth Whitley, or for her use or benefit. This is because she was not under the laws of Tennessee an heir of the decedent. The Washington judgment would be no bar in that state to a further prosecution by Mary Elizabeth Whitley, for the reason that the court of Tennessee wherein the administratrix obtained her appointment and official existence holds that the administratrix alone was the sole heir of the decedent and that she had no authority to and did not represent Mary
138 Elizabeth Whitley in the prosecution of the death claim in the Washington court.

9. The word "heirs" as used in sec. 4100 of the Rev. Codes of this state means such heirs as are entitled to inherit from a deceased person under the statute of this state.

Appeal from the District Court of the Eighth Judicial District, for Kootenai county, Hon. R. N. Dunn, Judge.

Action for damages for wrongful death. Judgment for plaintiff. Defendant appealed. Affirmed.

Will G. Graves, and Whitla & Nelson for appellant.

Elder & Elder and John P. Gray for respondent.

139 AILSHIE, *C. J.*:

This is an appeal from a verdict and judgment awarding the respondent, Elizabeth Whitley, the sum of $5,500 damages on account of the death of her son, A. P. Whitley.

The facts which it is necessary for the court to consider in determining the validity of this judgment are novel and unusual. The respondent is a citizen and resident of the state of Texas. The appellant is a Washington corporation with its principal place of business at Spokane and owns an electric railway which it operates between Spokane and Cœur d'Alene, Idaho.

On July 31, 1909, A. P. Whitley, a son of respondent and a resident and citizen of the state of Tennessee, was a passenger on appellant's train, and through the negligence of appellant's employees Whitley was killed. The accident and consequent death of A. P. Whitley occurred in Idaho near Cœur d'Alene. At the time of his death A. P. Whitley left a surviving wife, Josephine Whitley, who was at the time a resident and citizen of the state of Tennessee. In September, 1909, the appellant, whom we shall hereafter designate as the "railroad company", entered into an agreement with Josephine Whitley to pay the sum of $11,000 for and on account of the death of her husband, and thereupon paid her the sum of $1,500, with the understanding that she should apply for and receive letters of administration of the estate of A. P. Whitley from the proper court in the state of Tennessee, and that upon presenting

proof of her appointment she would be paid the balance of $9,500. Thereafter and on the 2d day of October, 1909, Josephine Whitley was duly and regularly appointed by the probate court of Shelby county, Tennessee, administratrix of the estate of A. P.
140 Whitley, deceased, and she thereupon applied to the court for permission as administratrix to make settlement with the railroad company for wrongfully causing the death of her husband, A. P. Whitley, and was accordingly authorized and directed to make settlement for the sum of $11,000 in accordance with the previous agreement entered into between her and the railroad company. On the 25th day of October, 1909, the respondent herein, Mary Elizabeth Whitley, commenced this action in the district court in and for Kootenai county, Idaho, alleging that she was the mother and heir at law of A. P. Whitley and his only surviving parent. She then pleaded the other essential facts to show a good cause of action and prayed for judgment in the sum of $25,000. Josephine Whitley was made a defendant in this cause of action, for the reason that she refused to join as a plaintiff. Personal service could not be had on Josephine Whitley, and accordingly application was made to procure service by publication on the ground of the absence of Josephine Whitley from the state of Idaho, and thereafter a copy of the complaint and summons *were* served upon Josephine Whitley in Spokane in the state of Washington in accordance with the provisions of our statute for constructive service. (Secs. 4145 and 4146, Rev. Codes). While this action was pending, Josephine Whitley was negotiating with the railroad company with a view to completing the settlement and securing final payment of the balance due under the agreement. The railroad company, however, refused to settle without an action and accordingly on the 18th day of November, 1909, a complaint was filed in the Superior Court of Spokane county, Washington, by Josephine Whitley as administratrix of the estate of A. P. Whitley, deceased, against the railroad company, ("Spokane and Inland Empire Railroad Co.") setting forth the cause of action and the agreement of September 14, 1909, entered into between the railroad company and Josephine
141 Whitley whereby the company agreed to pay her the sum of $11,000 in satisfaction of the claim. She also alleged her residence in the state of Tennessee and her appointment by the probate court of Shelby county as administratrix of the estate of her deceased husband and pleaded the death statute of Idaho, sec. 4100 of the Rev. Codes, which authorizes "the heirs or personal representatives" to maintain such an action. On the same date, November 18th, an answer and reply were filed and the case was tried without a jury, and the court found that the cause was not contested, made findings of fact and conclusions of law and entered a judgment in favor of Josephine Whitley as administratrix of the estate of A. P. Whitley, deceased, under her appointment from the court of Tennessee for the sum of $9,500, balance due under the agreement of settlement and compromise. To that action Mary Elizabeth Whitley, the respondent herein, was not a party and no attempt was made to bring her in or make her a party to such action.

The railroad company, however, pleaded in its answer the pendency of the present action in the district court of Kootenai county. The Washington court held that this plea was not good and that the pendency of the action of Mary Elizabeth Whitley against the railroad company in the Idaho court was no cause for abatement of the action of Josephine Whitley as administratrix against the railroad company in the Washington court. Josephine Whitley immediately collected her judgment and took the money to the state of Tennessee. Thereupon Mary Elizabeth Whitley made application to the probate court of Shelby county, Tennessee, to have the administratrix pay over to her one-half of the sum received from the railroad company as damages for causing the death of her son A. P. Whitley, on the ground that A. P. Whitley died without issue and that under the statutes of Idaho where a husband dies without issue the wife becomes the heir of one-half his estate and a
142 sole surviving parent inherits the other half of such estate.

The probate court held against Mary Elizabeth Whitley, and the case was appealed to the supreme court of Tennessee, and that court by an opinion filed July 14, 1912, affirmed the judgment of the probate court of Shelby county and held that the fund should be distributed according to the laws of Tennessee and that there "the surviving wife was the sole heir of A. P. Whitley, deceased," and that Mrs. Elizabeth Whitley, the mother of A. P. Whitley, deceased, had "absolutely no interest of any kind or character in said fund and no right to any part of the proceeds of recovery for the death of said A. P. Whitley."

Thereafter the case at bar was brought to issue in the district court of Kootenai county, Idaho, and the trial of the cause was commenced on the 9th day of September, 1912, subsequently resulting in a judgment in favor of the respondent herein.

The railroad company has at all times admitted its negligence in causing the death of A. P. Whitley and its liability to respondent in damages for his death. In the present case, however, it pleaded the judgment of the superior court of Spokane county, Washington, as a bar and defense to the right of Mary Elizabeth Whitley to recover in this case, and it also pleaded the judgment of the Tennessee court as a bar to the respondent's right of recovery in this case.

The various contentions made by the railroad company when recuced to their last analysis are to the effect that a recovery having been made by Josephine Whitley as administratrix of the estate of A. P. Whitley, deceased, is a bar to any subsequent recovery by an heir of A. P. Whitley under the death statute of Idaho, and that under the constitution of the United States, sec. 1, art. 4, and sec. 905 of the Revised Statutes, the judgment entered in the
143 superior court of Spokane county, Washington, and the judgment of the supreme court of Tennessee must "have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken" and that accordingly the Idaho courts

must hold that this matter has been adjudicated and that no further action can be maintained thereon.

We will consider the more important subdivisions of appellant's contention separately as they are treated in the briefs.

(1) It is contended that Josephine Whitley, being an heir of A. P. Whitley, deceased, was a necessary party to this action and that while she was made a party defendant she was not served personally and that service outside the state did not give the court jurisdiction as to her. Under sec. 4105, Rev. Codes, of this state, where the consent of a necessary party plaintiff cannot be had, such party may be joined as a party defendant. This statute was complied with in the present case. It is unnecessary for us to determine in this case whether the service of process had on Josephine Whitley was sufficient or not. She was made a party defendant in compliance with the statute, and it is clearly shown that it was impossible to secure personal service and that constructive service was made. It is also clear that the duty to bring her in was equally as exacting on the part of the railroad company as on the part of the plaintiff in the action, Mary Elizabeth Whitley. (Salmon v. Rathjens, 92 Pac. 733; Copeland v. City of Seattle, 74 Pac. 582; Galveston H. & S. A. R. Co. v. Kutac, 11 S. W. 127.)

Another reason exists and is decisive in this particular case. It clearly appears that under the laws of Idaho, the respondent herein, Mary Elizabeth Whitley, and Josephine Whitley are the only
144 heirs of A. P. Whitley, deceased. Josephine Whitley has prosecuted an action in the courts of Washington on this same cause of action and has recovered, and under the decision of the supreme court of Tennessee the entire recovery there had inured to her individual benefit as the sole heir under the laws of Tennessee of A. P. Whitley, deceased. She can have no further recovery. It was therefore unnecessary to make her a party, either plaintiff or defendant, in this particular action in order to bind her by the judgment and preclude her further recovery. We agree with the railroad company that, as a general rule, these actions cannot be split up and one action be prosecuted by one heir and another action by another heir or one action by the personal representative of the deceased and another action prosecuted by the heirs, provided the question or objection is timely raised in a proper manner. (St. Louis, etc., Ry. Co. v. Needham, 52 Fed. 371; McBride v. Berman, 94 S. W. 913; Whelan v. Rio Grande R. R. Co., 111 Fed. 326; Salmon v. Rathjens, 92 Pac. 733; Copeland v. City of Seattle, 74 Pac. 582; Galveston H. & S. A. R. Co. v. Kutac, 11 S. W. 127.)

(2) It is urged by appellant that under the doctrine of ratification and election Mary Elizabeth Whitley is barred from recovery in this action; that, having elected to go into the courts of Tennessee and there insist and contend that by the laws of Idaho she was an heir of A. P. Whitley, deceased, and entitled to one-half of the damages recovered from the railroad company for causing his death, and that having been defeated in that action she is now precluded from prosecuting her action in the courts of Idaho against the railroad company to recover as an heir at law of A. P. Whitley.

In our opinion, neither the doctrine as to ratification nor election of remedies applies in this case. Her attempted ratification
145 was rejected and repudiated and for that reason she cannot be bound under that doctrine. She offered to accept one-half of the Washington judgment as her share of that recovery and of her claim against the railroad company. That offer, however, was not made to the railroad company but to Josephine Whitley individually and as administratrix of the estate of A. P. Whitley, deceased, and the same offer was also tendered to the courts of Tennessee under the laws of which state Josephine Whitley was administering the estate of A. P. Whitley, deceased. Her offer of ratification was rejected and repudiated, and she never at any time received any benefits under that judgment. She is therefore clearly not bound under the doctrine of ratification. The rule seems to be well settled that in order to bind or estop one under the doctrine of ratification he must have accepted some benefit under or shared in the fruits of the judgment or other action or proceeding which he is supposed to have ratified. (23 Cyc. 698.) On the other hand, with reference to the doctrine of estoppel on the ground of election of remedies the rule is well settled that "in order to apply the doctrine of election of remedies the party must actually have at command two inconsistent remedies. He must not only think he has them, but must in fact have them." (Elliott v. Collins, 6 Ida. 266; In re Van Norman, 43 N. W. 334; Butler v. Hildreth, 5 Metcalf 49; Kaufman v. Cooper, 101 Pac. 969; Wilson v. Ewald, 113 N. Y. Suppo. 687; Mutual Auto Accessories Co. v. Beard, 110 N. Y. Supp. 416; 7 Am. & Eng. Ency. of Law, 364.)

In this case it appears that there was in fact no election of remedies. Mary Elizabeth Whitley evidently thought she was pursuing a lawful remedy when she made application to the probate court of Shelby county for a share in the receipts from the Washington judgment, but the supreme court of that state held
146 that she had no remedy, that she was not an heir and that no recovery had ever been had on her behalf or for her benefit. In fact, the court held that the action which Josephine Whitley as administratrix had prosecuted in the Washington court had not been prosecuted for or on behalf of Mary Elizabeth Whitley and that Josephine Whitley was not a representative or trustee of or for Mary Elizabeth Whitley in the prosecution of that action. This case is very different from the state of facts considered in Jones v. Stewart, 87 N. W. 12, and Jones v. Bank, 90 N. W. 912, and in noting the distinction we do not mean that we approve the line of reasoning adopted in both of those cases.

Another thing that should not be lost sight of in this case is that no attempt at election has ever been made as against the railroad company. Mary Elizabeth Whitley was not a party to the action prosecuted in the superior court of Spokane county and was not brought into the case, and, on the other hand, the railroad company was not a party to the proceeding in the Tennessee court, and so the respondent herein has never attempted to pursue but a single remedy

against the railroad company. Both respondent and the appellant have never met in court in this action.

(3) It is contended by the railroad company that the judgment herein in favor of Mary Elizabeth Whitley in substance and effect denies the "full faith and credit" to the Washington and Tennessee judgments which is commanded by the constitution of the United States, sec. 1, art. 4, and sec. 905 of the Rev. Statutes of the United States. If it does, it is clearly void. We understand it to be the absolute duty of the courts of this state to give to the judgments and judicial proceedings of the courts of every other state of the
147 Union the same faith and credit which such judgments and proceedings are accorded by the courts of the states respectively in which such judgments were entered and such proceedings were had. (Mills v. Duryee, 7 Cranch 481; Hampton v. McConnel, 3 Whea. 234; Cheever v. Wilson, 9 Wall. 123; Christmas v. Russell, 5 Wall. 302; 13 Cyc. 380; 8 Am. & Eng. Ency. 2d ed., 955; 1 Bailey on Jurisdiction, sec. 4; Brown on Jurisdiction, sec. 1-*a*.)

In order to reach a proper solution of this question, it is necessary to consider the character and binding effect of the judgments pleaded in the respective courts where rendered and entered. In the first place, the action prosecuted by Josephine Whitley as administratrix against the railroad company in the superior court of Spokane county, Washington, was based on an Idaho statute which was set up in the complaint and upon an accident which occurred in the jurisdiction of Idaho. The party plaintiff in that action was not a resident of the state of Washington and so pleaded in her complaint. She was a foreign administratrix. The respondent in this action, Mary Elizabeth Whitley, was never made a party to the Washington action, and the only way in which it could be said that she was bound by the judgment in that case is upon the theory that under the laws of Idaho she was an heir of A. P. Whitley, deceased, and that the foreign administratrix, Josephine Whitley, was prosecuting the action in the Washington court as trustee for all the heirs of A. P. Whitley, deceased. Mary Elizabeth Whitley may have supposed and evidently did suppose that such was the case and that when judgment should be obtained she would be declared by the courts to be an heir and therefore a cestui que trust in that fund. It must be remembered that the Washington court never at any time has determined who were the heirs for whom Josephine
148 Whitley was suing or whom she represented as administratrix and trustee. While the judgment was entered in Washington the fund was apparently never subjected to the Washington jurisdiction. The fruits of the Washington judgment, however, were at once subjected to the jurisdiction of the probate court of Shelby county, Tennessee, and that court at once held that Josephine Whitley had never represented Mary Elizabeth Whitley and had never prosecuted this action for her benefit and that Mary Elizabeth Whitley had no interest whatever in the fund received and that Josephine Whitley was the "sole heir and distributee of said A. P. Whitley, deceased." The railroad company was not a party to the proceeding at any time or in any manner in the courts of Tennessee. So far as it appears from the judgment both of the pro-

bate court of Shelby county, Tennessee, and of the supreme court of that state, no account whatever was taken in that proceeding of the laws of either the state of Washington or the state of Idaho, either as to their application in permitting the prosecution of a cause of action for a death claim or as to who constitute the heirs of a deceased person in either of those states. The Tennessee judgment appears to have been rested solely upon the statutes of that state.

It clearly appears then, first, that the respondent in this case, Mary Elizabeth Whitley, had no right of action and no claim whatever under the laws of the state of Tennessee; second, that she was never made a party to the action prosecuted in the state of Washington and that the action there prosecuted was not prosecuted for her or in her interest or on her behalf and that she was neither accorded representation there in person nor by trustee, administrator or other representative. She has, therefore, clearly never been a party to the Washington judgment and is not bound by that judgment. (Galveston H. & A. S. R. Co. v. Kutac,
149 11 S. W. 127). The Tennessee judgment, as heretofore observed, is in no manner a bar to the prosecution by Mary Elizabeth Whitley of her statutory cause of action in the state of Idaho against the railroad company that committed the injury and caused the damage.

This brings us to a consideration of the nature of this cause of action and the status of respondent in the courts of Idaho. Sec. 4100 of the Rev. Codes authorizes the prosecution of an action by the "heirs or personal representatives" of a deceased person against a person wrongfully causing the death of such person, and any judgment obtained in such an action inures to the benefit of the heirs of the decedent and in no case becomes a part of the assets of the estate of the deceased. Except for this statute no such action could be prosecuted in this state and no such cause of action could accrue in this state. (Webster v. Norwegian Mining Co., 70 Pac. 276; Burk v. Arcata, etc., R. R. Co., 57 Pac. 1067; 73 Am. St. 52; Munro v. P. C. D. & B. Co., 24 Pac. 303; 18 Am. St. 248; See also 9 and 10 Victoria, 93; Liggett v. G. N. Ry. Co., L. R. 1 Q. B. D. 599). The legislature had this power to confer this right on any heir or representative it saw fit to name or withhold the authority altogether. (Maysville Street R. R. & T. Co. v. Marvin, 59 Fed. 91.) The cause of action is not anything that ever belonged to the decedent or to his estate. It never accrued to the decedent. The action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute confers this right of action on the heirs, and it gives it directly to them or a personal representative such as an executor or administrator, and when such representative prosecutes the action, he does so
150 as trustee for the heirs. California and other states that have a similar statute have construed this statute and have uniformly held as above indicated. See Webster v. Norwegian Mining Co., 70 Pac. 276; Serenson v. Northern Pacific Ry. Co., 45

Fed. 407; Salmon v. Rathkens, 93 Pac. 733; Dennick v. Railroad Co., 103 U. S. 113, 26 L. Ed. 439; Galveston, etc., Co. v. Kutac, 11 S. W. 127.

It has been held that a personal representative of the decedent cannot maintain such an action without alleging and proving that the decedent has left surviving him an heir. (Serenson v. Ry. Co., 45 Fed. 407; Jones v. Leonardt, 101 Pac. 811). It is conceded that under the laws of the state of Idaho, the respondent, Mary Elizabeth Whitley, is an heir of A. P. Whitley, deceased, and that where the deceased, as in this case, left no issue, the surviving wife and surviving mother, the father being dead, are his only heirs and that they would inherit from him in equal shares. (Subd. 2, sec. 5702, Rev. Codes). A recovery in a foreign state, therefore, under the death statute of Idaho authorizing such an action for a wrongful death caused within this state, would not bar an action in this state by anyone who is an heir under the laws of Idaho and who was barred from participating as an heir under the laws of the foreign state. In other words, a recovery on such a cause of action in a foreign state for the use and benefit of persons who are heirs under the law of such foreign jurisdiction is not a bar to the further prosecution of an action in this state for the use and benefit of such heir or heirs under the laws of this state as were not included within the recovery in the foreign jurisdiction. (See Galveston, etc., Co. v. Kutac, 11 S. W. 127 on the principle here involved). The full faith and credit clause of the constitution of the United States and the act of Congress thereunder (Sec. 950, Rev. Stat.) do not require or command that any person who has a cause of action under the laws of this state shall be precluded
151 from that right or be barred the right of recovery by reason of a partial recovery in another jurisdiction or a recovery for the use and benefit of only a part of such persons as are authorized under our statute to maintain their action. The Tennessee judgment would be a bar in that state to a recovery by Mary Elizabeth Whitley, not because a recovery had once been had but for the reason that no recovery at all could be had there by or for her use and benefit. This is because she was not an heir of A. P. Whitley under the laws of Tennessee. The Washington judgment would be no bar in that state to a further prosecution by Mary Elizabeth Whitley, for the reason that the court of the foreign state wherein Josephine Whitley obtained her appointment and official existence holds that she alone was the sole heir of A. P. Whitley, deceased, and that she had no authority to and did not represent Mary Elizabeth Whitley in the prosecution of this death claim in the Washington court. These judgments, the one from Washington and the other from Tennessee, would clearly not be a bar in the respective states against anyone except one who was a party or privy to such action and then only to the extent of the subject matter and parties involved. Neither one of them adjudges Mary Elizabeth Whitley's right of recovery under the Idaho statute on this death claim, and the Tennessee Court holds in effect that she was never represented by the personal representative, Josephine Whitley, in the Washing-

ton action. If Josephine Whitley had come to Idaho and prosecuted her action, in the same manner with the same parties, solely under her appointment from the Tennessee court, and no question of her capacity to sue had been raised, and she had obtained a judgment such as she obtained in the state of Washington and had returned, as she did, with the fruits of that judgment to
152 Tennessee, such judgment, although rendered and entered in the Idaho jurisdiction, would not be a bar to the prosecution of this present action by Mary Elizabeth Whitley as an heir of A. P. Whitley, deceased. (Galveston, etc. Co. v. Kutac, 11 S. W. 127). The reason why it would not be is apparent; in prosecuting such action as a foreign administrator she was not representing all of the heirs who were entitled to recover under the Idaho statute. (Galveston, etc., Co. v. Kutac, 11 SW. 127; Maysville St. & R. R. Co. v. Marvin, 59 Fed. 91; St. Louis, etc., v. Beilharz, 88 SW. 512). Evidently an administratrix appointed under the laws of Tennessee does not represent every person there who is made an heir under the laws of Idaho.

We are aware that it has been suggested in a California case (Redfield v. Oakland Consolidated Ry. Co., 42 Pac. 822) that the word "heirs" as used in sec. 377 of the California Code of Civil Procedure, corresponding to sec. 4100 of our Rev. Codes, does not mean heirs such as are entitled to inherit from a deceased person under the statute of that state, but rather means "common law heirs" and is used in the "common law sense." What was said in that opinion seems to have been mere dictum and was not necessary to a decision of the case and does not appeal to us as being sound, and we would not be inclined to adopt that theory in this state. An heir is "one who on the death of another becomes entitled by operation of law to succeed to the deceased person's estate, as an estate of inheritance; an heir at law." (Standard Dictionary; Oxford Dictionary; Bouvier Law Dictionary; Black's Law Dictionary.) Our statute defines who shall inherit the property of a deceased person. Those persons are his "heirs", and our statute, sec. 4100, authorizes the "heirs" of a deceased person or his personal representative to maintain an action such as the one
153 at bar. In our opinion, those heirs are statutory heirs rather than common law heirs.

It is argued by respondent that the Washington judgment was of no effect, for the reason that Josephine Whitley never took out any letters of administration in that state and that a foreign administrator, acting solely under authority of an appointment in a foreign jurisdiction, has no right to maintain an action under the laws of the state of Washington. Counsel cite the case of Barlow & Shepherd v. Goggan, 1 Wash. Terr. 257, in which the Washington court held to the view maintained by respondent. That position seems to be sustained by the weight of authority. (Dennick v. Central R. R. Co., 103 U. S. 11, 26 L. Ed. 439; Maysville Street, etc., Co., v. Marvin, 59 Fed. 91; Hall v. Southern Ry. Co., 59 SE. 879). See also cases cited by this court in Anthes v. Anthes, 21 Ida. 305, wherein this court considered the question here discussed.

We have heretofore held, however, and we think correctly so, that although a foreign administrator has no authority to sue outside of the state where he receives his appointment, still the objection goes rather to his capacity to sue or maintain an action than to the sufficiency of the cause of action or the jurisdiction of the court, and that such question must be properly and timely raised by demurrer in the trial court. (Anthes v. Anthes, 21 Ida. 305.)

No legal reason is shown why this judgment should be reversed or disturbed. The judgment is affirmed with costs in favor of respondent.

Sullivan and Stewart, JJ., concur.

154 In the Supreme Court of the State of Idaho.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
MARY ELIZABETH WHITLEY, Defendant in Error.

CLERK'S OFFICE,
Supreme Court, ss:

Certificate of Clerk to Transcript.

I, I. W. Hart, Clerk of the Supreme Court, State of Idaho, do hereby certify that the foregoing transcript consisting of — pages is a full, true and correct copy of the following papers, as the same appear in the transcript on appeal to this court from the District Court of the Eighth Judicial District of the County of Kootenai, namely:

The complaint filed in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai.

Second amended answer of the Spokane & Inland Empire Railroad Company to said complaint, together with the exhibits attached thereto, also filed in said court.

The Findings of Fact and Conclusions of Law made by the Judge of the District Court in and for the Eighth Judicial District of the State of Idaho, in and for Kootenai County.

The judgment of said court.

Clerk's certificate to the judgment roll.

155 Application for order directing reporter to prepare transcript of evidence.

Order directing the preparation of a transcript of the testimony.

Notice of motion for a new trial.

The order of the District Judge of the Eighth Judicial District of the State of Idaho in and for Kootenai County denying motion for a new trial.

Certificate of the judge of such court of papers used on motion for a new trial.

Notice of appeal.

Affidavit of service.

Certificate of the clerk to filing of undertaking on appeal.

Præcipe to clerk to prepare transcript of appeal to Supreme Court.

Transcript of evidence used in the trial of the above entitled cause in the District Court of the Eighth Judicial District of the State of Idaho in and for Kootenai County, together with certificate of court reporter thereto.

Order settling and certifying transcript of evidence.

Clerk's certificate to the record in this cause.

I further certify that there are incorporated in said transcript, full, true and correct copies of Defendant's exhibits Nos. 1, 2, 3 and 4, as the same have been certified to this court by the clerk of the District Court in and for Kootenai County.

I further certify that said transcript contains true, full and correct copies of the record entries of this case in this court, including judgment and the opinion of the court in said cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Court, this 14th day of June, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*

156 In the Supreme Court of the State of Idaho.

MARY ELIZABETH WHITLEY, Respondent,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes the Spokane & Inland Empire Railroad Company and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed by the Supreme Court of the United States it makes the following assignment of errors:

I.

The Supreme Court of Idaho erred in holding that the judgment recovered by Josephine M. Whitley, administratrix of the estate of A. P. Whitley, deceased, against the Spokane & Inland Empire Railroad Company in the Superior Court of the State of Washington in and for Spokane County, and the satisfaction thereof, was not a bar to this action, the judgment so recovered in the said Superior Court of the State of Washington being for the identical cause of action upon which judgment was rendered herein against the said Spokane & Inland Empire Railroad Company, and the said Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, having full right and authority to maintain said suit in the said Superior Court of the State of Washington and recover judgment therein.

II.

The Supreme Court of the State of Idaho erred in holding that in the action brought by Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, against the Spokane & Inland Empire Railroad Company in the Superior Court of the State of Washington in and for Spokane County, that the said plaintiff administratrix did not, in maintaining such action and recovering such judgment, represent Mary Elizabeth Whitley, the respondent herein.

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III.

The Supreme Court of the State of Idaho erred in holding that the decision of the Probate Court of Shelby County in the State of Tennessee, holding that Mary Elizabeth Whitley the respondent herein, was not entitled to participate in the fund derived from the judgment recovered against the Spokane & Inland Empire Railroad Company by Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, for damages for causing the death of A. P. Whitley, and the subsequent affirmance of the decision of said Probate Court by the Supreme Court of the State of Tennessee, prevented the judgment of the Superior Court of the State of Washington in and for Spokane County being a bar to this action, and constituted and adjudication that Mary Elizabeth Whitley was not represented in the action in the Superior Court of the State of Washington in and for Spokane County in which the judgment aforesaid was recovered against the Spokane & Inland Empire Railroad Company.

IV.

The Supreme Court of the State of Idaho erred in holding that the judgments of the Tennessee courts aforesaid, the same being rendered in proceedings pending between Josephine M. Whitley and Mary Elizabeth Whitley to which the Spokane & Inland Empire Railroad Company was not a party, determined the capacity in which Josephine M. Whitley sued to recover damages for the death of A. P. Whitley, her intestate, in the Superior Court of the State of Washington in and for Spokane County; that it affected the capacity in which she sued in said action and rendered the judgment entered therein ineffectual as a bar to the present action.

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V.

The Supreme Court of the State of Idaho erred in holding that no reason appeared for reversing or disturbing the judgment of the District Court of the Eighth Judicial District of the State of Idaho in and for Kootenai County, and in affirming such judgment with costs in favor of respondent, for the reason that such ruling operated to deny full faith and credit within the State of Idaho to the judicial proceedings and judgment of a court of a sister state, to-wit: to the proceedings had and the judgment rendered by the Superior Court of the State of Washington in and for Spokane County in the

action brought in such court by Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, against the Spokane & Inland Empire Railroad Company; that by such ruling the Supreme Court of the State of Idaho refused to give to the judicial proceedings had and the judgment rendered by the Superior Court of the State of Washington in and for Spokane County, in the action aforesaid, the faith and credit which such judicial proceedings and judgment have by law and usage in the courts of the State of Washington. And your petitioner avers that by the judgment rendered in said District Court of Kootenai County and in its affirmance by the Supreme Court of the State of Idaho, there was a denial to your petitioner of the rights guaranteed it by virtue of sec. 1 of Article IV of the Constitution of the United States and sec. 905 of the Revised Statutes of the United States.

For which errors the appellant herein, the Spokane & Inland Empire Railroad Company, prays that the said judgment of the Supreme Court of the State of Idaho filed in said court on April 14, 1913, affirming the judgment of the District Court of the Eighth Judicial District of the State of Idaho, for Kootenai County,
159 against appellant be reversed, and that it be directed that the final order and judgment of the Supreme Court of the State of Idaho, and of the District Court of the Eighth Judicial District of the State of Idaho in and for Kootenai County be set aside and held for naught, and that appellant have judgment that the respondent take nothing against it, and that it recover from respondent its costs.

S. H. HAYS,
WILL G. GRAVES,
Attorneys for Spokane & Inland Empire Railroad Company.

Endorsed: Filed April 29, 1913. I. W. Hart, Clerk.

160 In the Supreme Court of the State of Idaho.

MARY ELIZABETH WHITLEY, Respondent,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Appellant.

Petition for Writ of Error.

Your petitioner Spokane & Inland Empire Railroad Company, the appellant herein, respectfully sets forth and shows that heretofore, upon to-wit; October 28, 1912, the District Court of the Eighth Judicial District for Kootenai County in the State of Idaho, rendered and entered judgment herein in respondent's favor and against appellant, ordering, adjudging, and decreeing that respondent should have and recover from appellant the sum of five thousand five hundred ($5,500) dollars, together with costs and disbursements; that thereupon appellant duly appealed to the Supreme Court of the

State of Idaho from such judgment, and heretofore, upon to-wit; April 14, 1913, the said Supreme Court affirmed the judgment appealed from, with costs in favor of respondent; that the said Supreme Court is the highest court of the State of Idaho in which a decision of this cause can be had. Considering itself aggrieved by the final decision of the said Supreme Court in rendering judgment against it in the above entitled cause, appellant hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States and an order fixing the amount of a supersedeas bond, and that all necessary steps may be taken herein whereby a writ of error may be secured and issued.

161 The appellant presents herewith its assignment of errors in this cause.

S. H. HAYS,
WILL G. GRAVES,
Attorneys for Appellant.

STATE OF IDAHO,
Supreme Court, ss:

Let a writ of error issue herein upon the execution of a bond by the Spokane & Inland Empire Railroad Company to Mary Elizabeth Whitley, conditioned as required by law, in the sum of seven thousand dollars, such bond, when duly conditioned and approved, to act as a supersedeas until the final disposition of this cause in the Supreme Court of the United States.

Dated April 29th, 1913.

J. F. AILSHIE,
Chief Justice of the Supreme Court of Idaho.

[Endorsed:] No. 2165. In the Supreme Court of the State of Idaho. Mary Elizabeth Whitley, Respondent, vs. Spokane & Inland Empire Railroad Company, Appellant. Petition for Writ of Error. Graves, Kizer & Graves, Attorneys for Appellant. Filed this 29 day of Apr., 1913. I. W. Hart, Clerk. By E. S. David, Deputy.

162 In the Supreme Court of the State of Idaho.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

MARY ELIZABETH WHITLEY, Defendant in Error.

Bond.

Know all men by these presents, That we, Spokane & Inland Empire Railroad Company, a corporation, as principal, and American Surety Company of New York, a Corporation, as surety, are held and firmly bound unto Mary Elizabeth Whitley in the sum of Seven Thousand & No/100 Dollars, to be paid to the said obligee, her successors, heirs, personal representatives and assigns, to which

payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 29th day of April, 1913.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho and has sued out its writ of error herein.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

163 SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

[SEAL.] By C. J. DAVIDSON, *Secretary-Treasurer.*

AMERICAN SURETY COMPANY OF NEW YORK,

By FRANK C. PAINE,

Resident Vice-President.

Attest:

B. H. KIZER,

Resident Assistant Secretary.

Attest:

SHEPPARD & FALK,

Per BRADLEY SHEPPARD. [SEAL.]

Boise, Idaho.

April 29, 1913.

STATE OF WASHINGTON,
County of Spokane, ss:

Frank C. Paine, being first duly sworn, deposes and says: That he is an officer of the surety company executing the foregoing bond, to-wit: the resident vice-president of such company; that such company is authorized to become a surety upon bonds of all sorts within the State of Idaho, having complied with the laws of the State of Idaho in that behalf; that the seal affixed to the foregoing instrument is the corporate seal of the said company, and that said instrument was signed and sealed on behalf of said company by the authority of its board of directors, and that he acknowledges the above bond to be the free act and deed of said company by it duly authorized.

FRANK C. PAINE.

Subscribed and sworn to before me this 23d day of April, 1913.

[SEAL.] E. L. McCUNE,

Notary Public in and for the State of Washington, Residing at Spokane.

Bond approved and to operate as a supersedeas.

J. F. AILSHIE,

Chief Justice of the Supreme Court of Idaho.

Endorsed: Filed April 29, 1913. I. W. Hart, Clerk.

164 In the District Court of the United States in and for the District of Idaho.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
MARY ELIZABETH WHITLEY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Mary Elizabeth Whitley and the Spokane & Inland Empire Railroad Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or ex-
165 emption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said Spokane & Inland Empire Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of April, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON,
Clerk of the District Court of the United States in and for the District of Idaho, Having His Office at Boise, the Capital of said State.

Writ allowed:
J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

[Endorsed:] In the District Court of the United States in and for the District of Idaho. Spokane & Inland Empire Railroad Company, Plaintiff in Error, vs. Mary Elizabeth Whitley, Defendant in Error. Writ of Error. Graves, Kizer & Graves, Attorneys for Plaintiff in Error. Filed this 29 day of April, 1913. I. W. Hart, Clerk.

166 In the Supreme Court of the State of Idaho.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
MARY ELIZABETH WHITLEY, Defendant in Error.

Certificate of Lodgment.

CLERK'S OFFICE,
Supreme Court, ss:

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the original of the foregoing supersedeas bond was lodged with me as such clerk on the 29th day of April, 1913 and the following endorsement made thereon: Bond. Filed this 29th day of April, 1913. I. W. Hart, Clerk, by E. S. David, Deputy

I further certify that the original of the foregoing Writ of Error was lodged with me as such clerk, on the 29th day of April, 1913 and also at the same time and place a copy thereof for Defendant in Error. The following endorsement was made upon said original writ and upon said copy: Writ of Error. Filed this 29th day of April, 1913. I. W. Hart, Clerk.

In witness whereof, I hereunto set my hand and affix the seal of the Court, this 14th day of June, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*

167 In the Supreme Court of the State of Idaho.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
MARY ELIZABETH WHITLEY, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mary Elizabeth Whitley, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.,

within sixty (60) days from the date hereof, pursuant to a writ of error entered in the office of the Supreme Court of the State of Idaho, wherein the Spokane & Inland Empire Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Idaho this 29th day of April, 1913.

J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

Attest:

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of Idaho.

168 CŒUR D'ALENE, IDAHO, May 5, 1913.

I, John P. Gray, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JOHN P. GRAY,
Attorney for Mary Elizabeth Whitley.

168½ [Endorsed:] No. 2165. In the Supreme Court of the State of Idaho. Spokane & Inland Empire Railroad Company, Plaintiff in Error, vs. Mary Elizabeth Whitley, Defendant in Error. Citation. Graves, Kizer & Graves, Attorneys for Plaintiff in Error. Filed this 9" day of May, 1913. I. W. Hart, Clerk. By E. S. David, Deputy.

169 In the Supreme Court of the State of Idaho.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
MARY ELIZABETH WHITLEY, Defendant in Error.

Acceptance of Service.

We hereby accept service of the petition for writ of error, the assignment of errors and prayer for reversal, the bond on writ of error, and the citation herein, and acknowledge the receipt of copies of all such papers.

ROBERT ELDER,
JOHN P. GRAY,
Attorneys for Defendant in Error.

169½ [Endorsed:] No. 2165. In the Supreme Court of the State of Idaho. Spokane & Inland Empire Railroad Com-

pany, Plaintiff in Error, vs. Mary Elizabeth Whitley, Defendant in Error. Acceptance of Service. Graves, Kizer & Graves, Attorneys for Plaintiff in Error. Filed this 9" day of May, 1913. I. W. Hart, Clerk. By E. S. David, Deputy.

170 In the Supreme Court of the State of Idaho.

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Boise, this June 14, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiff's costs, $15.00, paid by the Spokane-Inland Empire Railway Company.

Defendant's costs, $33.30, paid by Mary Elizabeth Whitley.

Costs of transcript $96.75, paid by the Spokane-Inland Empire Railway Company.

I. W. HART,
Clerk Sup. Ct. Idaho.

171 In the Supreme Court of the United States.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
MARY ELIZABETH WHITLEY, Defendant in Error.

Statement of Errors Which Will be Relied upon by Plaintiff in Error and Designation of the Parts of the Record Necessary for the Consideration Thereof Which it is Desired Should be Printed.

Plaintiff in error will rely upon the hearing of this cause before this Honorable Court upon the following errors committed by the lower court, to-wit;

I.

The Supreme Court of Idaho erred in holding that the judgment recovered by Josephine M. Whitley, administratrix of the estate of

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A. P. Whitley, deceased, against the Spokane & Inland Empire Railroad Company in the Superior Court of the State of Washington in and for Spokane County, and the satisfaction thereof, was not a bar to this action, the judgment so recovered in the said Superior Court of the State of Washington being for the identical cause of action upon which judgment was rendered herein against the said Spokane & Inland Empire Railroad Company, and the said Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, having full right and authority to maintain said suit in the said Superior Court of the State of Washington and
172 recover judgment therein.

II.

The Supreme Court of the State of Idaho erred in holding that in the action brought by Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, against the Spokane & Inland Empire Railroad Company in the Superior Court of the State of Washington in and for Spokane County, that the said plaintiff administratrix did not, in maintaining such action and recovering such judgment, represent Mary Elizabeth Whitley, the respondent herein.

III.

The Supreme Court of the State of Idaho erred in holding that the decision of the Probate Court of Shelby County in the State of Tennessee, holding that Mary Elizabeth Whitley, the respondent herein, was not entitled to participate in the fund derived from the judgment recovered against the Spokane & Inland Empire Railroad Company by Josephine M. Whitley administratrix of the estate of A. P. Whitley, deceased, for damages for causing the death of A. P. Whitley, and the subsequent affirmance of the decision of said Probate Court by the Supreme Court of the State of Tennessee, prevented the judgment of the Superior Court of the State of Washington in and for Spokane County being a bar to this action, and constituted an adjudication that Mary Elizabeth Whitley was not represented in the action in the Superior Court of the State of Washington in and for Spokane County in which the judgment aforesaid was recovered against the Spokane & Inland Empire Railroad Company.

IV.

The Supreme Court of the State of Idaho erred in holding that the judgments of the Tennessee courts aforesaid, the same being rendered in proceedings pending between Josephine M.
173 Whitley and Mary Elizabeth Whitley to which the Spokane & Inland Empire Railroad Company was not a party, determined the capacity in which Josephine M. Whitley sued to recover damages for the death of A. P. Whitley, her intestate, in the Superior Court of the State of Washington in and for Spokane County; that it affected the capacity in which she sued in said action and rendered the judgment entered therein ineffectual as a bar to the present action.

V.

The Supreme Court of the State of Idaho erred in holding that no reason appeared for reversing or disturbing the judgment of the District Court of the Eighth Judicial District of the State of Idaho in and for Kootenai County, and in affirming such judgment with costs in favor of respondent, for the reason that such ruling operated to deny full faith and credit within the State of Idaho to the judicial proceedings and judgment of a court of a sister state, to-wit: to the proceedings had and the judgment rendered by the Superior Court of the State of Washington in and for Spokane County in the action brought in such court by Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, deceased, against the Spokane & Inland Empire Railroad Company; that by such ruling the Supreme Court of the State of Idaho refused to give to the judicial proceedings had and the judgment rendered by the Sperior Court of the State of Washington in and for Spokane County, in the action aforesaid, the faith and credit which such judicial proceedings and judgment have by law and usage in the courts of the State of Washington. And your petitioner avers that by the judgment rendered in said District Court of Kootenai County and in its affirmance by the Supreme Court of the State of Idaho, there was a denial to your petitioner of the rights guaranteed it by virtue of sec. 1 of Article IV of the Constitution of the United States and sec. 905 of the Revised Statutes of the United States.

174 Plaintiff in error designates the following parts of the record which it considers necessary for the consideration of the errors upon which it will rely, and which it desires printed as the record upon which the cause shall be heard, to-wit:

First. The complaint in this action filed in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, found upon pages one (1) to five (5) inclusive of the record transmitted to this court by the Clerk of the Supreme Court of the State of Idaho.

Second. The second amended answer of plaintiff in error to the foregoing complaint, with the exhibits attached thereto, the same being found upon pages six (6) to twenty-three (23) of said record.

Third. The findings of fact and conclusions of law made in this action by the trial court, and the judgment entered thereon, the same being found on pages twenty-three (23) to thirty-two (32), inclusive, of said record.

Fourth. The notice of motion for new trial made by plaintiff in error in the trial court, the same being found upon pages thirty-six (36) to forty-three (43) of said record.

Fifth. Defendant's Exhibit 1 introduced upon the trial of this action in the trial court, consisting of the summons, complaint, answer (with exhibit attached thereto), reply, findings of fact and conclusions of law, judgment and certificates attached thereto, all in the case of Josephine M. Whitley as administratrix of the estate of A. P. Whitley, deceased, v. Spokane & Inland Empire Railroad Company, a corporation, defendant, a cause pending in the Superior

Court of the State of Washington in and for the County of Spokane, the same being found upon pages forty-four (44) to sixty-eight (68), inclusive of said record.

175 Sixth. Defendant's Exhibit 2 consisting of the certified records of proceedings in the Probate Court of Shelby County, Tennessee, found on pages sixty-nine (69) to seventy-two (72) of said record.

Seventh. Defendant's Exhibit 3 consisting of certified copies of certain proceedings in the Probate Court of Shelby County, Tennessee, the same being found upon pages seventy-three (73) to ninety-three (93), inclusive, of said record.

Eighth. Defendant's Exhibit 4 consisting of certified copies of the proceedings from the Supreme Court of the State of Tennessee, the same being found upon pages ninety-four (94) to ninety-six (96), inclusive, of said record.

Ninth. The transcript of evidence showing the evidence introduced and the proceedings had upon the trial of this action in the trial court, found upon pages one hundred seven (107) to one hundred twenty-nine (129), inclusive, of said record.

Tenth. Record entries taken from the record of the Supreme Court of Idaho showing the proceedings had and taken in this cause in such court, together with the opinion of the Supreme Court of Idaho rendered herein, the same to be found upon pages one hundred thirty-three (133) to one hundred fifty-three (153) of said record.

Eleventh. The certificate of the clerk of the Supreme Court of Idaho to the transcript, found upon pages one hundred fifty-four (154) to one hundred fifty-five (155), inclusive, of said record.

Twelfth. The assignment of errors and prayer for reversal, petition for writ of error, bond, writ of error, certificate of lodgment, citation, acceptance of service and return to writ, found upon pages one hundred fifty-six (156) to one hundred seventy (170), inclusive, of said record.

B. B. ADAMS,
WILL G. GRAVES,
Attorneys for Plaintiff in Error.

176 We hereby accept service of the foregoing statement of errors which will be relied upon and designation of the parts of the record which it is desired by plaintiff in error to be printed in this cause.

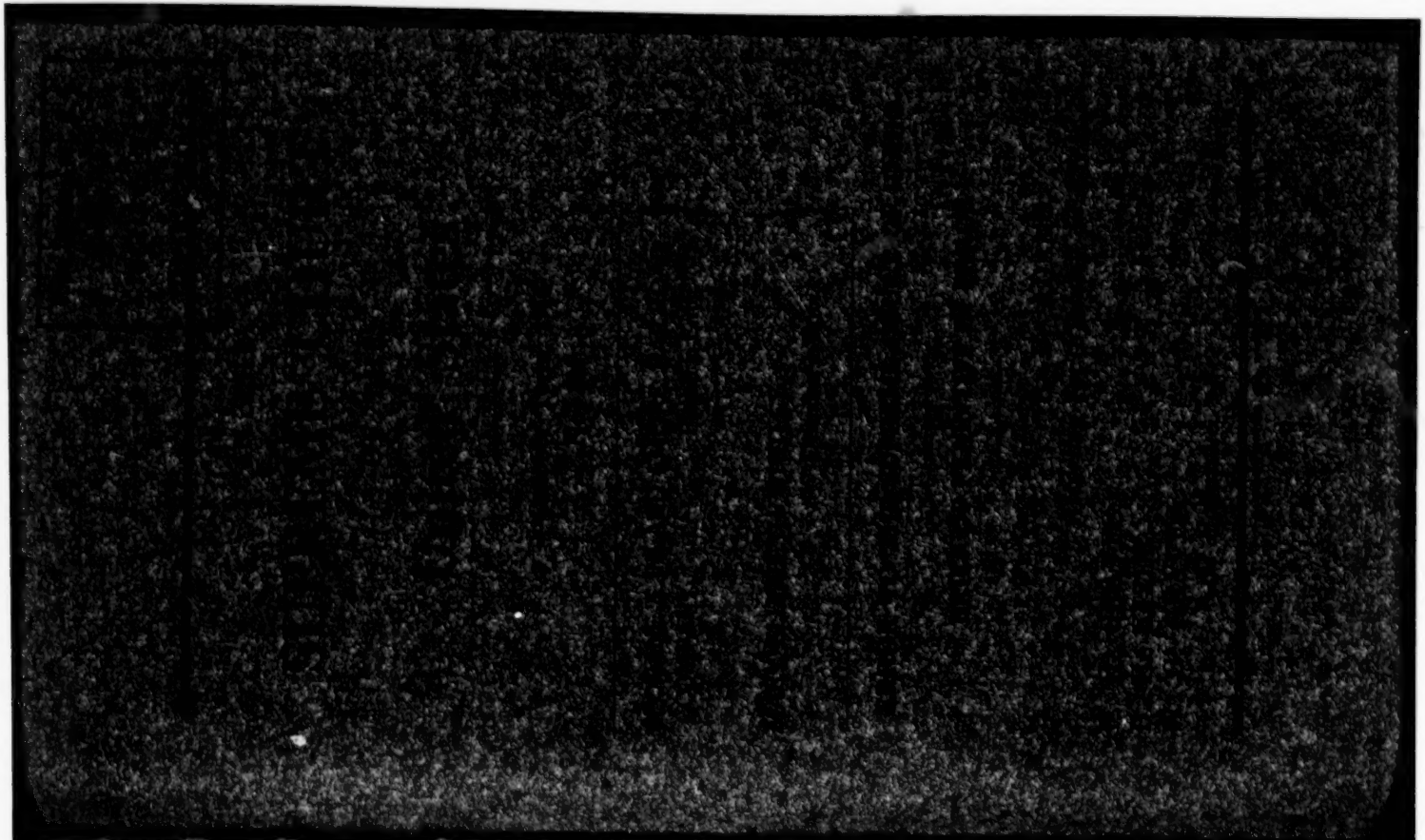
ROBERT ELDER,
JOHN P. GRAY,
Attorneys for Defendant in Error.

177 [Endorsed:] 612-13/23763. In the Supreme Court of the United States. Spokane & Inland Empire Railroad Company, Plaintiff in Error, vs. Mary Elizabeth Whitley, Defendant in Error. Statement of errors which will be relied upon by plaintiff in error and designation of the parts of the record necessary for the consideration thereof which it is desired should be printed. B. B.

Adams, Will G. Graves, Graves, Kizer & Graves, Attorneys for Plaintiff in Error, Spokane, Washington.

[Endorsed:] File No. 23,763. Supreme Court U. S. October term, 1913. Term No. 612. Spokane & Inland Empire Railroad Company, Plaintiff in Error, vs. Mary Elizabeth Whitley. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed. Filed June 27, 1913.

Endorsed on cover: File No. 23,763. Idaho Supreme Court. Term No. 206. Spokane & Inland Empire Railroad Company, plaintiff in error, vs. Mary Elizabeth Whitley. Filed June 25, 1913. File No. 23,763.



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IN THE

SUPREME COURT

OF THE

United States

October Term, 1914
No. 206

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,

vs.

MARY ELIZABETH WHITLEY, Defendant in Error.

ERROR TO THE SUPREME COURT OF IDAHO

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

Mary Elizabeth Whitley, the defendant in error, brought this action in the District Court of the

Eighth Judicial District of the State of Idaho to recover damages from plaintiff in error for causing the death of her son, A. P. Whitley, which occurred while he was a passenger upon one of its trains in Idaho. It was not disputed that the death of A. P. Whitley occurred under circumstances which rendered plaintiff in error liable in damages. Sundry defenses were interposed, however, the only one for consideration here being that Josephine M. Whitley, the widow of A. P. Whitley, suing as administratrix of his estate, had theretofore recovered a judgment against plaintiff in error for damages for causing his death in a court of competent jurisdiction of the State of Washington, and that such judgment had been satisfied. It was claimed that the rendition of that judgment, followed by its satisfaction, barred this action, and full faith and credit for the judgment as a complete defense to this action was claimed under the constitution and statutes of the United States. The trial court held that the recovery in the courts of Washington was not a bar to the action, and rendered judgment in favor of defendant in error for $5500 damages. Upon appeal to the Supreme Court of Idaho, the

highest court of the state, the judgment was affirmed, whereupon a writ of error was sued out from this court; its jurisdiction being invoked upon the ground that the courts of Idaho have denied faith and credit to the judgment of the Washington court.

SPECIFICATIONS OF ERROR.

The Supreme Court of Idaho erred:

First. In holding that the judgment for damages for the death of A. P. Whitley recovered by Josephine M. Whitley, as administratrix of the estate of A. P. Whitley, in the Superior Court of the State of Washington for Spokane County, and its satisfaction, was not a bar to this action.

Second. In denying the full faith and credit to the Washington judgment which is required by §1 of Art. IV of the Constitution and §905 of the Revised Statutes of the United States.

Third. In holding that defendant in error might recover damages for the death of A. P. Whitley from plaintiff in error notwithstanding the former recovery of such damages by the administratrix of his estate in the action waged in the State of Washington.

ARGUMENT.

Note. For convenience the parties will hereinafter be referred to by their designations in the state courts; the defendant in error as plaintiff and the plaintiff in error as defendant. The page references are to the printed record.

The defendant is a corporation created under the laws of the State of Washington, and its principal place of business is in the City of Spokane, in such state. It owns and operates as a common carrier a line of railway extending from Spokane into Idaho, and is subject to the jurisdiction of the courts of both Washington and Idaho. On July 31, 1909, A. P. Whitley, a resident of Tennessee, while temporarily in Idaho, was killed while a passenger upon one of defendant's trains. There were in effect in Washington and Idaho at that time statutes permitting the recovery of damages for death caused by wrongful act. The Idaho statute is as follows:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal repre-

sentatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

2 *Idaho Revised Codes,* §4100.

The Washington statute, less concise, but of identical effect, reads as follows:

"The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. When the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death,

> may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, as under all circumstances of the case may to them seem just."
>
> 1 *Rem. & Bal. Ann. Codes,* §183.

It is conceded that A. P. Whitley's death was caused by defendant's negligence, and, the statutes of the two states being so similar, it cannot be questioned that defendant was suable as well in Washington as in Idaho, under the Idaho statute, for damages because of his death.

A. P. Whitley left surviving him Josephine M. Whitley, his widow, who resided with him in Tennessee, and his mother, the plaintiff in this action, who resided in Texas. In September, 1909, defendant agreed with his widow to pay $11,000 as full compensation for the death of A. P. Whitley, upon condition that she should be appointed administratrix of his estate at his and her domicile in Tennessee, and such settlement should be approved by the court appointing her. Fifteen hundred dollars was at once paid her. On October 2, 1909, she was appointed administratrix of A. P.

Whitley's estate by the Probate Court of Shelby County, Tennessee, where A. P. Whitley resided at the time of his death, and thereafter that court authorized her to settle the claim against defendant for the death of her intestate for $11,000 (Record, p. 17).

Plaintiff commenced this action to recover damages for the death of A. P. Whitley in a District Court of Idaho on October 25, 1909. Josephine Whitley refused to join in the action, and plaintiff accordingly made her a defendant, serving her with process in Washington (Record, pp. 16-17). Upon the commencement of the action, defendant refused to carry out its agreement of settlement with Josephine Whitley, and she thereupon commenced an action against it in the Superior Court of the State of Washington for Spokane County, the place where its principal place of business is. The complaint, answer, reply, findings and judgment in that action will be found on pp. 26-38 of the record. The plaintiff sued as administratrix of the estate of A. P. Whitley, and alleged that she was the duly appointed, qualified, and acting administratrix of his estate. It was further alleged that her intestate's death occurred in

Idaho, and was caused by defendant's negligence, and §4100 of the Idaho statutes (heretofore quoted) was pleaded as giving her a cause of action for damages for his death. The agreement to settle for $11,000, the payment of $1500, and the refusal to complete the settlement, were all pleaded, and a recovery of $9500 was prayed (Record, pp. 26-28). By its answer the defendant joined issue upon the plaintiff's appointment as administratrix, and averred that the agreement to pay $11,000 in settlement of the claim for damages for the death of A. P. Whitley was conditional upon her appointment as administratrix of his estate by a court of competent jurisdiction, and the authorization of such settlement by that court, and that she had not proven either appointment or authorization of settlement. As an affirmative defense the commencement of this action in the courts of Idaho was pleaded, and it was averred that Mary Elizabeth Whitley, the plaintiff therein, was the mother of A. P. Whitley and one of his heirs under the laws of Idaho, and that to permit a recovery by the administratrix would expose defendant to a double liability (Record, pp. 29-31). By her reply the plaintiff admitted

the pendency of the Idaho action, but denied that thereby the defendant would be exposed to a double liability, and averred that as administratrix of the estate of A. P. Whitley she had "full power and authority under the laws of the State of Idaho" to settle or recover upon the claim for his death, and any such settlement or recovery would be a bar to a recovery in the Idaho action (Record, p. 34). Trial was had to the court without a jury, and findings of fact and conclusions of law were made under the Washington statute which provides that

> "Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."
>
> "The order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reason, as far as applicable, and a new trial granted."
>
> 1 *Rem. & Bal. Ann. Codes*, §§367, 368.

Such findings are essential to a valid judgment.

Barb v. Kleeb, 1 Wash., 370.
Kilroy v. Mitchell, 2 Wash., 407.
Sadler v. Niesz, 5 Wash., 182.

And, as the statute requires, they are treated in all respects as the verdict of a jury.

Willey v. Morrow, 1 Wash. Ty., 474.
Reynolds v. Dexter Horton & Co., 2 Wash., 185.
Gerhard v. Warrell, 20 Wash., 492.

Upon the evidence submitted the Washington court found that A. P. Whitley was domiciled in Shelby County, Tennessee, at the time of his death, and left estate there, and that plaintiff had been duly appointed administratrix of his estate by the Probate Court of Shelby County, and had duly qualified and was acting as such administratrix; that A. P. Whitley was killed in Idaho through defendant's negligence, and that $11,000 was "a just and adequate compensation to be awarded to the heirs and estate of A. P. Whitley" for his death; that under the death recovery statute of Idaho (quoting it) his administratrix was entitled to recover for his death; that the agreement to settle the claim for damages for causing his death for

$11,000 had been submitted to and approved by the Probate Court of Shelby County, and the plaintiff had been authorized by order of that court to accept such sum "in full settlement of all claims of the estate and heirs of A. P. Whitley against said defendant" and $1500 had been paid on account of such settlement; that subsequent to the authorization of such settlement by the Probate Court of Shelby County, and the payment of the $1500, the mother of A. P. Whitley, Mary Elizabeth Whitley, had commenced an action (the present one) in the District Court of the Eighth Judicial District of Idaho against defendant to recover upon the same cause of action as that before the court. As conclusions of law from such facts the court found that the institution of the action in the courts of Idaho by Mary Elizabeth Whitley was not a defense to the action, nor did it entitle defendant to have the action stayed until the determination of the Idaho action, and that plaintiff, as administratrix, was entitled to recover $9500, together with costs, from defendant (Record, pp. 35-38). Judgment for $9500 was entered against defendant upon the findings and conclusions on November 18, 1909 (Record,

p. 38). The amount of the judgment was paid to plaintiff, and she thereupon returned to her domicile in Tennessee (Record, p. 18).

After the commencement of the present action (on October 25, 1909), nothing was done toward its prosecution for several years. On February 16, 1910, however, the plaintiff herein, suing as Elizabeth Whitley, filed a petition in the Probate Court of Shelby County, Tennessee, in the matter of the estate of A. P. Whitley, deceased, averring his death by wrongful act in Idaho, the settlement by his administratrix of the claim for damages for his death for $11,000, stating the petitioner's interest in the fund derived from the settlement under the laws of Idaho, and praying that the administratrix might be required to give an increased bond (Record, pp. 42-43). On March 14, 1910, an amended petition was filed in which plaintiff averred that she was entitled, under the death and descent statutes of Idaho, to one-half of the $11,000 recovered by the administratrix for the death of A. P. Whitley (Record, pp. 43-45). The administratrix answered, denying plaintiff's right to participate in the recovery, and asserting that the laws of Tennessee, and not the laws of

Idaho, determined the distribution of the recovery, and that under the laws of Tennessee the widow was solely entitled thereto (Record, pp. 45-49). Judgment went against plaintiff in the Probate Court, and the judgment was affirmed upon appeal to the Supreme Court of Tennessee, that court holding (on July 14, 1912) that the fund arising from the recovery by the administratrix "is to be distributed in accordance with the laws of the State of Tennessee and not the laws of the State of Idaho," and that therefore A. P. Whitley's widow was entitled to the entire fund to the exclusion of his mother (Record, pp. 53-54).

Failing in her attempt to secure a part of the administratrix' recovery through the courts of Tennessee, the plaintiff renewed the prosecution of the present action in the courts of Idaho. On August 8, 1912, defendant filed an answer to her complaint, setting up, *inter alia*, the judgment recovered by the administratrix in the State of Washington for damages for the death of A. P. Whitley and its satisfaction, and claiming protection under such judgment by virtue of the full faith and credit clause of the Constitution (Record, pp. 4-14). The cause was tried to the

court without a jury, and the court, having found the facts substantially as they have been heretofore stated, found as conclusions of law that the Washington judgment was not a bar to the action, and that plaintiff was entitled to recover $5500 damages from defendant for the death of A. P. Whitley, and judgment was entered accordingly (Record, pp. 14-20). An appeal was taken to the Supreme Court of Idaho, where the judgment was affirmed, the opinion affirming it appearing upon pp. 69-80 of the record, and is published *sub nom. Whitley v. Spokane & Inland Ry. Co.*, 23 Idaho, 642.

Before taking up the grounds on which the learned court held that the recovery in the courts of the State of Washington did not stand in the way of a second recovery in the courts of the State of Idaho, there are sundry fundamental rules which it may be well to state, by way of reminder.

(1) Under a statute like that of Idaho, where the right to recover damages for death by wrongful act is given to the "heirs or personal repre-

sentatives" of the decedent, there is but one right of action and there can be but one recovery. Either of the designated classes may sue in the first instance, there being no prior right of suit in either, and a recovery by one is a bar to a second suit by the other.

Hartigan v. So. Pac. (Cal.), 24 Pac., 851.

Daubert v. Meat Co. (Cal.), 73 Pac., 244.

Salmon v. Rathjens (Cal.), 92 Pac., 733.

Alder Co. v. Fleming, 159 Fed., 593.

McBride v. Berman, 79 Ark., 62; 94 S. W., 913.

St. Louis etc. Co. v. Needham, 52 Fed., 371.

Whelan v. Railway Co., 111 Fed., 326.

Hawkins v. Barber A. Pav. Co., 202 Fed., 340.

Beard v. Skeldon, 113 Ill., 584.

Louisville etc. Co. v. Sanders, 86 Ky., 259; 5 S. W., 563.

Willis etc. Co. v. Grizzell, 100 Ill. App., 480.

Peers v. Water Company, 119 Fed., 400.

Con. Coal Co. v. Dambrowski, 106 Ill. App., 641.

Louisville etc. Co. v. McElwain, 98 Ky., 700; 34 S. W., 236.

Di Paolo v. Lumber Company, 178 Fed., 877.

Roberts v. Railway Company, 124 Fed., 471.

Keele v. Railway Company (Mo.), 131 S. W., 730.

Foster v. Hicks (Miss.), 46 So., 533.

Tenn. Cent. R. Co. v. Brown (Tenn.), 143 S. W., 1129.

In re Taylor, 204 N. Y., 135; 97 N. E., 502.

Kling v. Torello, 87 Conn., 301; 87 Atl., 987.

Marquezo v. Koch (Mo.), 161 S. W., 648.

Shawnee etc. Co. v. Motesenbacker (Okl.), 138 Pac., 790.

Riggs v. N. P. Railway Co., 60 Wash., 292.

Benson v. Lumber Company, 71 Wash., 616.

(2) A right of action conferred by a state statute to recover damages for death by wrongful act is transitory, and may be maintained in another state whose laws give a similar remedy under a similar state of facts.

Dennick v. Railroad Co., 103 U. S., 11.

Texas & P. R. Co. v. Cox, 145 U. S., 593.

Stewart v. Railroad Co., 168 U. S., 445.

(3) The right of action is enforced in another state upon the theory that "when a person re-

covers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of tort that accompanies the person of the defendant elsewhere" (*West. Un. Tel. Co. v. Brown,* 234 U. S., 542), and therefore the right to recover and its incidents are governed by the *lex loci* and not by the *lex fori.*

Cuba R. R. Co. v. Crosby, 222 U. S., 473.
Nor. Pac. R. Co. v. Babcock, 154 U. S., 190.
Stewart v. Railroad Co., 168 U. S., 445.
Reynolds v. Day (Wash.), 140 Pac., 681.

The rule extends to all substantial incidents of the action, so that distribution of the amount recovered should be made in accordance with the laws of the state where the cause of action arose.

Dennick v. Railroad Co., 103 U. S., 11.
Leenan v. Railroad Co., 128 Fed., 191.
Denver & R. G. Co. v. Warring (Colo.), 86 Pac., 305.
Hartley v. Hartley (Kan.), 81 Pac., 505.
McDonald v. McDonald's Admr. (Ky.), 28 S. W., 482.
Texas etc. Co. v. Miller (Tex.), 128 S. W., 1165.
Bolinger v. Beacham (Kan.), 106 Pac., 1094.

Cowen v. Ray, 108 Fed., 320.

Florida etc. Co. v. Sullivan, 120 Fed., 799.

(4) The Supreme Court of Idaho held in this case that

> "The statute confers this right of action on the heirs, and it gives it directly to them or a personal representative such as an executor or administrator, and when such representative prosecutes the action, he does so as trustee for the heirs."
>
> Opinion of the Court, Record, p. 77.

Under the authorities above cited, it is not material what is the rule in Washington in that behalf, since the capacity in which a personal representative sues in the courts of Washington to recover damages under the Idaho statute for a death occurring in Idaho is determined by the Idaho statute, from which, solely, he derives the right to sue at all; but it may be remarked that the rule in Washington is the same as in Idaho, as, indeed, it is everywhere under like statutes; *viz.,* that the recovery is not for the benefit of the estate, but for the sole benefit of the heirs, and when a personal representative sues, he does so as trustee for the heirs.

Copeland v. Seattle, 33 Wash., 415.

Archibald v. Lincoln County, 50 Wash., 55.

(5) The administratrix, though appointed under the laws of Tennessee, was authorized to recover from defendant in Washington upon the right of action given by the statute of Idaho:

a. Because the statute conferring it does not require that it be enforced in the Idaho courts, or by a personal representative appointed by the Idaho courts. It may therefore be enforced in the courts of another state, and by a representative appointed by the courts of another state.

Dennick v. Railroad Co., 103 U. S., 11.

Hodges v. Kimball, 91 Fed., 845.

Mo. Pac. R. Co. v. Lewis (Neb.), 40 N. W., 401.

Higgins v. Railroad Co. (Mass.), 29 N. E., 534.

Chandler v. Railroad Co. (Mass.), 35 N. E., 89.

Ill. Cent. R. Co. v. Crudup, 63 Miss., 291.

Leonard v. Nav. Co., 84 N. Y., 48.

b. Because a personal representative who sues upon a right of action given by the Idaho statute does so as trustee for the heirs, is at least a *quasi* trustee, and the rule that a receiver or an administrator appointed by the courts of one state will

not be permitted to sue in the courts of another state, does not apply to a *quasi* assignee or *quasi* trustee.

Bernheimer v. Converse, 206 U. S., 516.

Converse v. Hamilton, 224 U. S., 243.

Kansas etc. Co. v. Cutter, 16 Kan., 568.

Jeffersonville etc. Co. v. Hendrix, 41 Ind., 48.

Memphis etc. Co. v. Pikey (Ind.), 40 N. E., 527.

Wabash etc. Co. v. Shacklet, 105 Ill., 364.

Bouldin v. Railroad Co. (Pa.), 54 Atl., 906.

Robertson v. Railroad Co. (Wis.), 99 N. W., 433.

St. Louis etc. Co. v. Graham (Ark.), 102 S. W., 700.

Kelly v. Railroad Co. (Mo.), 125 S. W., 818.

Voris v. Railroad Co. (Mo.), 157 S. W., 835.

Knight v. Moline etc. Co. (Ia.), 140 N. W., 839.

c. Because the Superior Court of the State of Washington for Spokane County held that the Tennessee administratrix might sue and recover in the courts of Washington upon the right of action given by the statutes of Idaho. While that court is not the highest court of the state,

nevertheless its decision as to what is the law of the state must be accepted by this court as conclusive in the absence of a controlling statute or decision of a higher court.

Laing v. Rigney, 160 U. S., 531, 542.
Fish v. Smith (Conn.), 47 Atl., 711.

There is no statute or decision of a higher court to the contrary.

(6) Though the personal representative sues for the benefit of, and as trustee for, the heirs of the decedent, they are not entitled to be made parties to the action, or in any way control it. He is their representative for all the purposes of the action.

Yelton v. Railroad Co. (Ind.), 33 N. E., 629.

Pittsburg etc. Co. v. Moore (Ind.), 53 N. E., 290.

Cleveland etc. Co. v. Osgood (Ind.), 73 N. E., 285.

Major v. Railroad Co. (Ia.), 88 N. W., 815.

Harshman v. Railroad Co. (N. D.), 103 N. W., 412.

City of Louisville v. Hart's Admr. (Ky.), 136 S. W., 212.

Slusher v. Weller (Ky.), 151 S. W., 684.

Harbin etc. Co. v. McFarland's Admr. (Ky.), 160 S. W., 798.

It follows that he may in good faith compromise the claim without the consent of the beneficiaries.

Foot v. Railroad Co. (Minn.), 84 N. W., 342.

Washington v. Louisville etc. Co. (Ill.), 26 N. E., 653.

The widow possesses the same right where she is authorized to sue in behalf of herself and children.

Shambach v. Electric Co. (Pa.), 81 Atl., 802.

Hamilton v. Railroad Co. (Mo.), 154 S. W., 86.

(7) Where several judgments founded upon the same cause of action are recovered against the same defendant in several different states, a payment of one of them is a satisfaction of all.

2 *Black, Judgments* (2d Ed.), §1013.

23 *Cyc.*, p. 1493.

17 *Am. & Eng. Enc. of Law* (2d Ed.), p. 863.

For a statement of the rule in actions to recover damages for death by wrongful act, see

Nelson v. Railroad Co. (Va.), 14 S. E., 838.

And see *Harris v. Balk,* 198 U. S., 215, 226, where it was said:

> "It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment."

None of these fundamental rules was questioned by the Supreme Court of Idaho; the greater portion of them, indeed, were either stated or assumed in its opinion. The obvious conclusion flowing from them under the constitutional and statutory prescriptions that full faith and credit must be given the judicial proceedings of one state in the courts of another state, was avoided by the learned court by the following ratiocinatory process:

First. That under the death claim statute of Idaho, the recovery for a wrongful death does not belong to the estate of the decedent but to his

heirs, the recovery being solely for their benefit, and that therefore when a personal representative recovers he does so as trustee for the heirs (Record, p. 77).

Second. That under the statutes of Idaho, where (as in the present case) a decedent leaves surviving him a widow and a mother, but no children or father, the widow and mother are equal heirs, and are entitled to share equally in a recovery of damages for his death (Record, p. 78).

Third. That a recovery by or for the benefit of only one of several who are entitled to share in a recovery under the death claim statute of Idaho does not bar another action and a further recovery by those whose rights were not considered and provided for in the first recovery (Record p. 78).

Fourth. That as Josephine Whitley sued as administratrix in the Washington courts under her appointment as such by the courts of Tennessee, and as the courts of Tennessee afterwards held that the widow was alone entitled to the fund recovered by the administratrix through the

action in Washington, to the exclusion of the mother, because the statutes of Tennessee and not those of Idaho governed the distribution of the fund, therefore Josephine Whitley did not represent all the heirs of A. P. Whitley in the action prosecuted by her in Washington, but only herself, and consequently the recovery there, being for her sole benefit, did not bar this action by the other heir for her sole benefit. To quote: "Evidently an administratrix appointed under the laws of Tennessee does not represent every person there who is made an heir under the laws of Idaho," and consequently Josephine Whitley in prosecuting the Washington action as administratrix under her Tennessee appointment "was not representing all of the heirs who were entitled to recover under the Idaho statute" (Record, p. 79).

The three propositions first stated are based upon a construction of the Idaho statute, and are therefore unquestionable. The fourth runs counter to the Federal constitution and statute, and is therefore unsustainable. Its unsoundness is proven by the statute itself.

Judicial proceedings in the courts of each state

> "* * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."
>
> *Revised Statutes,* §905.

The ingenuity of courts, as well as of counsel, has often been exerted in an attempt to distort this perfectly plain language to mean something other than it expresses; never, however, successfully.

> "The act declares, that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, *viz.*, record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record, by declaring what faith and credit shall be given to it.
>
> It remains only then to inquire, in every case, what is the effect of a judgment in the state where it is rendered?"
>
> *Mills v. Duryee,* 7 Cranch, 481.

> "This is precisely the same case as that of *Mills v. Duryee;* the court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit

thereon in such state, and none others, could be pleaded in any other court in the United States."

Hampton v. McConnell, 3 Wheat., 234.

"When the question of the construction of that act of Congress was first presented to this court it was argued that the act provided only for the admission of such records as evidence; that it did not declare their effect; but the court refused to adopt the proposition, and held, as the act expressly declares, that the record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the state court from whence it was taken.

Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defense. Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits. Speaking of the before-mentioned act of Congress, Judge Story says it has been settled, upon solemn argument, that the enactment does declare the effect of the records as evidence when duly authenticated. * * * 'If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere' in the courts of the United States."

Christmas v. Russell, 5 Wall., 302.

The jurisdiction of the court rendering the judgment, and whether notice was given the defendant, are always open to inquiry, but, as was further said in *Christmas v. Russell*:

> "Subject to those qualifications, the judgment of a state court is conclusive in the courts of all the other states whenever the same matter is brought in controversy."

Judgments

> "* * * can have no greater or less or other effect in other courts than in those of their own state."
>
> *Tilt v. Kelsey,* 207 U. S., 43, 57.

We make no question that if it were true, as stated by the learned court, that when the administratrix brought the action and recovered judgment in the courts of Washington "she was not representing all of the heirs who were entitled to recover under the Idaho statute," the Washington judgment would not be a bar to an action in Idaho by an heir who was not represented in the Washington action. Neither, of course, would it be a bar to such an action in Washington, for it would only conclude, wherever it might be invoked, those who were parties to it, in person or by rep-

resentation. But the statement is not true, and the process by which the court reached its conclusion demonstrates its untruth, or, at least, that it is baseless so far as anything which the court considered is concerned.

The rationale of the decision is found in this:

> "The Tennessee judgment would be a bar in that state to a recovery by Mary Elizabeth Whitley, not because a recovery had once been had but for the reason that no recovery at all could be had thereby or for her use and benefit. This is because she was not an heir of A. P. Whitley under the laws of Tennessee. The Washington judgment would be no bar in that state to a further prosecution by Mary Elizabeth Whitley, for the reason that the court of the foreign state wherein Josephine Whitley obtained her appointment and official existence holds that she alone was the sole heir of A. P. Whitley, deceased, and that she had no authority to and did not represent Mary Elizabeth Whitley in the prosecution of this death claim in the Washington court. These judgments, the one from Washington and the other from Tennessee, would clearly not be a bar in the respective states against anyone except one who was a party or privy to such action and then only to the extent of the subject matter and parties involved. Neither one of them adjudges Mary Elizabeth Whitley's right of recovery under the Idaho statute on this death claim, and the Tennessee court holds

in effect that she was never represented by the personal representative, Josephine Whitley, in the Washington action. If Josephine Whitley had come to Idaho and prosecuted her action, in the same manner with the same parties, solely under her appointment from the Tennessee court, and no question of her capacity to sue had been raised, and she had obtained a judgment such as she obtained in the state of Washington and had returned, as she did, with the fruits of that judgment to Tennessee, such judgment, although rendered and entered in the Idaho jurisdiction, would not be a bar to the prosecution of this present action by Mary Elizabeth Whitley as an heir of A. P. Whitley, deceased (*Galveston etc. Co. v. Kutac,* 11 S. W., 127). The reason why it would not be is apparent; in prosecuting such action as a foreign administrator she was not representing all of the heirs who were entitled to recover under the Idaho statute (*Galveston etc. Co. v. Kutac,* 11 S. W., 127; *Maysville St. & R. R. Co. v. Marvin,* 59 Fed., 91; *St. Louis etc. v. Beilharz,* 88 S. W., 512). Evidently an administratrix appointed under the laws of Tennessee does not represent every person there who is made an heir under the laws of Idaho."

Opinion, Record, pp. 78-79.

It appears, then, that no inquiry was made as to what the Washington court adjudicated, nor as to the effect which the Washington courts would have given the judgment had it there been called in question. That, apparently, was considered a

matter of no importance. The decision is based upon the assumption that because the courts of Tennessee appointed the administratrix, they had the power to determine her right to sue in the courts of Washington, the capacity in which she would sue, and whom she would represent. And this, it is assumed, the courts of Tennessee did determine, with retroactive effect, when they held that the widow of A. P. Whitley was entitled to the entire damages recovered in Washington for his death.

It is difficult to argue seriously against a decision based upon such a groundwork. When the Washington judgment was offered as a defense to the Idaho action, there were but two questions for the consideration of the Idaho courts. The first: Was the judgment rendered by a court of competent jurisdiction, possessing jurisdiction of the subject matter of the action in which the judgment was rendered and over the parties to it? The second: Were the two causes of action the same; *i. e.*, was the Washington judgment based upon the Idaho statute, and rendered for the benefit of those whom the Idaho statute intended should receive the recovery thereunder? To an-

swer those questions the Idaho courts could look nowhere but to the proceedings of the Washington court, viewed in the light of the statutes of that state and the decisions of its courts. Looking there, neither answer is in doubt. It is conceded that the Superior Court for Spokane County is a court of general jurisdiction, and that the parties to the action were duly before it, and it can not be denied that the action was under the Idaho statute and for the benefit of those authorized to recover thereunder. The plaintiff, suing as the personal representative of A. P. Whitley, pleaded §4100 of the Idaho statutes authorizing a recovery of damages by the heirs or personal representatives of one whose death is caused by the wrongful act or neglect of another, alleged that A. P. Whitley came to his death in Idaho through the defendant's negligence, and averred that under the Idaho statute she was "entitled to institute this proceeding against defendant to recover the amount due for the death of said A. P. Whitley" (Record, pp. 26-28). In answer the defendant pleaded the pendency of the present action in Idaho, brought by one of the heirs of A. P. Whitley, and prayed that the Washington action be

stayed until the disposal of the Idaho action, else it would be exposed to double liability (Record, pp. 30-31). The plaintiff replied, denying that the pending Idaho action would expose the defendant to double liability, and reiterating that

> "* * * as administratrix of the estate of A. P. Whitley, deceased, she had full power and authority under the laws of the State of Idaho, as set forth in the complaint and in the answer of defendant to agree to a settlement of the said claim against said company, and that a settlement thereof would be a full and complete bar to the recovery of any sum or sums in the said suit brought in the State of Idaho as aforesaid."
>
> Record, p. 34.

Upon these issues the court found that A. P. Whitley met his death in Idaho through defendant's negligence, and that the plaintiff was administratrix of his estate by virtue of the appointment of a court of competent jurisdiction of the State of Tennessee; found that by virtue of the laws of Idaho a cause of action arose for the homicide of A. P. Whitley, and that "by virtue thereof the plaintiff herein is entitled to institute this proceeding against defendant to recover the amount due for the death of the said A. P. Whitley";

found that the pendency of the Idaho action did not entitle defendant to a stay until it was disposed of, and thereupon rendered judgment in plaintiff's favor as prayed (Record, pp. 35-38).

The Washington court having entertained the action solely because it was authorized by the Idaho statute, and having rendered judgment for the plaintiff purely because in its opinion she was authorized by the Idaho statute to sue, and a recovery by her under the statute would bar a second suit by the heirs upon the same cause of action, no reasonable excuse can be offered for the refusal of the Idaho courts to give the same effect to it. The Washington court intended, of course, to give effect to the Idaho statute in every incident of the recovery, for the Supreme Court of that state has held that a transitory action, to recover for a tort committed in another state, is to be maintained under, and in its every incident governed by, the *lex loci* and not the *lex fori.*

> "Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to

> the public policy of the state where the action is brought, nor contrary to abstract justice, nor pure morals, nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions *ex contractu* and actions *ex delicto.* In all such cases, the right to recover is governed by the *lex loci* and not by the *lex fori.*"
>
> *Reynolds v. Day* (Wash.), 140 Pac., 681, 683.

Had it been otherwise, and had the Washington court not proceeded in such strict conformity to the Idaho statute, the Washington recovery would have been none the less conclusive. The judgment might have been rendered at the suit of some one not designated by the Idaho statute, and the method of distribution might have differed from that contemplated by that statute, *e. g.,* the distribution among those entitled to the recovery might have been made by the jury instead of according to the statutes of descent, and yet it would have been conclusive. Though a state statute which authorizes a recovery for death by wrongful act requires that the action shall be brought in the name of the state, and that the distribution of the award must be made by the jury, an action under it may be maintained by a personal repre-

sentative in another jurisdiction, where distribution of the award must be made in accordance with the statutes of descent. The substantial thing is the award of damages for the benefit of the heirs of the deceased, and it is wholly immaterial how that result is accomplished.

> *Stewart v. Balto. & O. R. Co.,* 168 U. S., 445.

Even had the Washington court misconceived the law of Idaho, and rendered judgment in accordance with its mistaken view in a case where the Idaho courts would not have given relief the effect must have been given it in Idaho which it had in Washington.

> "Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. *Pitts v. Fugate,* 41 Missouri, 405; *State v. Trammel,* 106 Missouri, 510; *In re Copenhaver,* 118 Missouri, 377. A judgment is conclusive as to all the *media concludendi* (*United States v. California & Oregon Land Co.,* 192 U. S., 355); and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. Of course a want of jurisdiction over either the person or the subject-

matter might be shown. *Andrews v. Andrews,* 188 U. S. 14; *Clarke v. Clarke,* 178 U. S., 186. But as the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. See *Godard v. Gray,* L. R. 6 Q. B. 139; *MacDonald v. Grand Trunk Ry. Co.,* 71 N. H., 448; *Peet v. Hatcher,* 112 Alabama, 514."

Fauntleroy v. Lum, 210 U. S., 230, 237.

That a judgment of the courts of another state is founded upon a demand which is illegal in the state where it is sought to be enforced, or that recognition of it is expressly prohibited by statute, as a rule of public policy, in such state, will not justify a refusal to give effect to it. Nothing can be considered but its effect in the courts of the state where it was rendered, and that same effect must be given it in the courts of every other state.

Christmas v. Russell, 5 Wall., 290.
Fauntleroy v. Lum, 210 U. S., 230.

There is, of course, no occasion for resort to the decisions last cited to impugn the decision under review. No debatable question is here involved. The case is of the simplest. Had the courts of Idaho looked only to the judicial pro-

ceedings in the courts of Washington, no pretext could have been found for denying the same effect to the Washington judgment which the Washington courts gave to it. Only by resort to the unheard of process of determining the effect of the Washington judgment by reference to the subsequent decisions of the Tennessee courts was its credit attainted.

While legally a matter of no moment, we think it ought to be remarked that the declaration of the learned court that the Tennessee courts held "that Josephine Whitley had never represented Mary Elizabeth Whitley and had never prosecuted this action for her benefit"; that they held in effect "that she was never represented by the personal representative, Josephine Whitley, in the Washington action," and that such holding established the fact as well for the courts of Washington as for Tennessee, is as untrue in fact as it is unsound in law. The issues joined in the Tennessee courts were, first, whether the laws of Tennessee or of Idaho determined the distribution of the fund recovered, and, second, if the Idaho laws were held to govern, who were the heirs entitled to participate in the recovery. (See pleadings,

record, pp. 43-49.) The Supreme Court of Tennessee answered the first question by holding "that said fund is to be distributed in accordance with the laws of the State of Tennessee, and not the laws of the State of Idaho," and so went to the widow to the exclusion of the mother, without considering the second question (Record, p. 54). More modest in its own conception of its powers than was the Supreme Court of Idaho for it, it is obvious that the Supreme Court of Tennessee dreamed no dream of omnipotence in which it decided for the courts of Washington the capacity in which a litigant had there sued, whom she represented, and what the character of her recovery, but confined itself to its appropriate sphere of deciding by what law the distribution of the fund within its jurisdiction was to be governed. That it decided wrongly did not affect its power to decide.

One further consideration. Speaking of the Idaho statute permitting a recovery for death by wrongful act, the Supreme Court of Idaho said:

> "Except for this statute no such action could be prosecuted in this state and no such cause of action could accrue in this state

(*Webster v. Norwegian Mining Co.*, 70 Pac., 276; *Burk v. Arcata etc. R. R. Co.*, 57 Pac., 1067, 73 Am. St., 52; *Munro v. P. C. D. & B. Co.*, 24 Pac., 303, 18 Am. St., 248; see also 9 and 10 Victoria, 93; *Liggett v. G. N. Ry. Co.*, L. R. 1 W. B. D. 599). The legislature had this power to confer this right on any heir or representative it saw fit to name or withhold the authority altogether (*Maysville Street R. R. & T. Co. v. Marvin*, 59 Fed., 91). The cause of action is not anything that ever belonged to the decedent or to his estate. It never accrued to the decedent. The action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute confers this right of action on the heirs, and it gives it directly to them or a personal representative such as an executor or administrator, and when such representative prosecutes the action, he does so as trustee for the heirs. California and other states that have a similar statute have construed this statute and have uniformly held as above indicated. See *Webster v. Norwegian Mining Co.*, 70 Pac., 276; *Serenson v. Northern Pacific Ry. Co.*, 45 Fed., 407; *Salmon v. Rathkens*, 93 Pac., 733; *Dennick v. Railroad Co.*, 103 U. S., 113, 26 L. Ed., 439; *Galveston etc. Co. v. Kutac*, 11 S. W., 127."

Opinion, Record, p. 77.

A personal representative, then, does not sue purely as executor or administrator, but as trustee

ex officio, and he is trustee for the purposes of the action solely because the Idaho statute giving the right of action for death by wrongful act has made him so. By the courts of whatever state appointed, and in the courts of whatever state he sues, he is endowed with the attributes of a trustee which are given him by the Idaho statute, and for that reason may maintain an action to recover under the Idaho statute in the courts of any state, even though by its statutorily or court expressed policy a foreign executor or administrator may not there sue with respect to assets of an estate. See authorities, (5) b, *supra.* It follows that when Josephine Whitley sued in the courts of Washington as administratrix of the estate of A. P. Whitley, to recover damages under the Idaho statute for his death, her suit was that of a trustee for those for whose benefit the Idaho statute gave the right of action.

It is commonly accepted law that a judgment to which a trustee is a party binds his *cestuis que trust* (*Beals v. Railroad Co.,* 133 U. S., 290; *Kent v. Railroad Co.,* 144 U. S., 75); that in all honest dealings *cestuis que trust* are bound by the acts of their trustee (*Shaw v. Railroad Co.,* 100

U. S., 605); and that a purchaser from a trustee is not bound to see to the disposition of the payment he makes to the trustee (*Wormley v. Wormley,* 8 Wheat., 421; *Potter v. Gardner,* 12 Wheat., 498). By parity of reason, the heirs are bound by the suit and the compromises of the personal representative whom the statute authorizes to recover damages for death by wrongful act (see authorities, subdivision (6), *supra*), and the defendant in such an action has nothing to do with the distribution of the sum recovered from him as damages, but discharges his full obligation when he pays the judgment rendered against him (13 *Cyc.,* pp. 380-382; 8 *Am. & Eng. Enc. of Law* (2d Ed.), p. 955).

Yet here the defendant was held liable to a second recovery because the trustee who was authorized to sue and recover judgment and receive its proceeds breached her duty, and instead of accounting to her *cestui que trust* took the trust fund into another state, the courts of which refused to compel her to account to her *cestui* as she would have been compelled to had the litigation over the fund occurred in the state where the trust fund had its origin or was recovered. And

this notwithstanding the defendant, who is now called upon to make good to the *cestui que trust* what she did not recover from her trustee, was not a party to the litigation between them over the disposal of the trust fund.

In stating its conclusions of law, the District Court of Idaho referred to the Washington judgment as one entered "upon consent and agreement between the said Josephine Whitley and the said railroad company" (Record, p. 19).

If the fact were as stated, the effect of the judgment would not have been impaired, for judgments by default or confession are as conclusive as any other.

> 2 *Black, Judgments* (2d Ed.), §§697, 698.
>
> *Seattle Nat. Bk. v. School Dist.*, 20 Wash., 368.
>
> *McGhee v. Wincholt*, 23 Wash., 748.
>
> *State ex rel. Schmidt v. Superior Court*, 62 Wash., 556.

But the fact was not as stated, for the findings of fact, upon which the judgment rests, recite that they were made after a trial duly had, and are

based upon evidence adduced by the respective parties (Record, p. 35). If the fact that the judgment was rendered by consent affected its validity, the fact could not have been shown collaterally to impeach the judgment in Washington.

Rogers v. Miller, 13 Wash., 82.
Christofferson v. Pfennig, 16 Wash., 491.
Peyton v. Peyton, 28 Wash., 278.
Ballard v. Way, 34 Wash., 116.
Munch v. McLaren, 9 Wash., 676.
Belles v. Miller, 10 Wash., 259.

Under the Federal statute, the judgment was no more impeachable in that manner in Idaho than in Washington.

Defendant readily concedes what appears upon the record: that it made no defense to the merits of the action. It made none for the very good reason that it had none, A. P. Whitley having been killed while a passenger upon one of its trains through the negligence of its employes. Submission to a judgment against which one has no defense is not consent to the judgment, nor payment of it voluntary payment.

"It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defense to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defense, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here."

Harris v. Balk, 198 U. S., 215, 227.

The defendant was liable to pay some one damages for the death of A. P. Whitley. It deemed that it would be protected, in the face of the conflicting demands of his widow and his mother, if it paid that person whom a court of competent jurisdiction held entitled to receive payment. And for that reason it satisfied without appeal the judgment which the Washington court rendered against it.

While it was not made a ground of decision, it was insisted by plaintiff's counsel in the state courts that the Washington judgment was of no

effect because the court rendering it was without jurisdiction to do so. No question is made of the jurisdiction of the court over the subject matter of the action, but the theory was advanced that a foreign administrator is not permitted by the laws of Washington to sue in its courts, and it was claimed that therefore a judgment rendered at the suit of such an administrator is beyond the jurisdiction of the court. No statute is cited to support so unusual a claim, and nothing but an early decision by the territorial court, rendered in 1869 and reported, *Barlow v. Goggan,* 1 W. T., 257, holding that a foreign administrator may not sue to recover assets of the estate, is cited to sustain the proposition. Of course the decisions of the territorial court are not conclusive upon the state courts, and therefore the decision of the Superior Court that it did have jurisdiction and that the foreign administratrix was entitled to maintain the action is conclusive as to the law of the state in that behalf, no decision of the State Supreme Court, nor no statute to the contrary, appearing.

Laing v. Rigney, 160 U. S., 531.

Moreover, whether a foreign administrator may

or may not sue is a question going purely to the capacity of the plaintiff to maintain the action, and again and again, under variant facts and in variant phases, has the Supreme Court of Washington held that the capacity of a party to sue or defend is not a question going to the jurisdiction or the merits of an action, and that it must therefore be raised at an appropriate time and in an appropriate manner or the judgment rendered is conclusive.

Blumauer v. Clock, 24 Wash., 596.

Hale v. Paper Co., 56 Wash., 236.

State ex rel. etc. v. Superior Court, 21 Wash., 33.

State ex rel. etc. v. Superior Court, 55 Wash., 215.

Rothchild Bros. v. Mahoney, 51 Wash., 633.

Thompson-Spencer Co. v. Thompson, 61 Wash., 547.

Bowman v. Harrison, 59 Wash., 56.

Pierson v. N. P. R. Co., 61 Wash., 450.

Hale v. Cab Co., 66 Wash., 459.

Buckles v. Reynolds, 58 Wash., 485.

Again and again has the Supreme Court of Washington said that a judgment of a court possessing jurisdiction over the subject matter of

and the parties to an action cannot be impeached for errors or irregularities.

Kizer v. Caufield, 17 Wash., 421, 422.
Dubuque v. Stitch, 16 Wash., 641.
State v. Dredging Co., 43 Wash., 508.
Munch v. McLaren, 9 Wash., 676.
Kalb v. Loan Society, 25 Wash., 349.
Tilton v. O'Shea, 31 Wash., 513.
Pollock v. Horn, 13 Wash., 626.
Belles v. Miller, 10 Wash., 259.

Since the courts of Washington would not hold a judgment impeachable collaterally because of some defect in the capacity of the plaintiff to sue, the judgment is not vulnerable to attack on such a ground in the courts of Idaho.

Counsel's contention, of course, was based upon a failure to distinguish between the principle which animates courts and legislatures to deny the right of a foreign administrator to sue to recover assets of an estate, and the principle which permits a foreign administrator to sue as trustee *ex officio* to recover damages for the death of his intestate for the benefit of the heirs of the deceased. We commend to their attention the

authorities cited in subd. (5) b, *supra;* also for a general statement of the distinguishing principle, *Purple v. Whitehead,* 49 Vt., 187.

In order to determine whether full faith and credit have been denied the Washington judgment, the court will examine the proceedings in the Washington court in the light of the statutes of that state and the decisions of its courts, and determine therefrom the nature of the liability enforced, who were represented in the action, the credit the judgment was entitled to in the courts of Washington; every question, indeed, which affects the claim of the judgment to recognition in the courts of another state. The decision of the Idaho courts upon any of such matters neither concludes nor affects this court.

Huntington v. Attrill, 146 U. S., 657.
Converse v. Hamilton, 224 U. S., 243.

It is regrettable, no doubt, that in the litigation over the damages recovered for the death of A. P. Whitley, the Tennessee courts should have denied effect to the Idaho statute, whereby the

plaintiff failed to secure the portion thereof to which she was entitled. That it is regrettable, however, scarcely seems just cause for making defendant the instrument of a vicarious atonement. It is the less justifiable because plaintiff is alone responsible for the situation in which she finds herself, for the wrong done her by the courts of Tennessee could have been remedied by a writ of error from this court. When rights in personalty have been fixed, they are not affected by the removal of the parties and the property to another state, whatever the laws of the latter state.

Bank of United States v. Lee, 13 Peters, 107.

De Lane v. Moore, 14 Howard, 253.

Title to personal property which is vested by judicial proceedings in the state where the property is situate, must be respected in the courts of any state in which it may be called in question.

Green v. Van Buskirk, 5 Wall., 307.

Same v. Same, 7 Wall., 139.

In the last cited case it was said (p. 148):

"And as the effect of the levy, judgment and sale is to protect Green if sued in the

courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another state for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a state the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings."

In the case at bar, the Idaho statute conferred a right of action for the death of A. P. Whitley, and provided that the damages recovered should go to his widow and mother. This right of action was enforced in Washington under the Idaho statute, and the recovery, as the courts of Washington have declared, was governed by the laws of Idaho and not of Washington. The laws of Tennessee, of course, in no way entered into or affected the recovery. Whitley's administratrix, therefore, received in Washington the fruits of the judgment recovered by her in Washington in the capacity fixed by the Idaho statute, *viz.*, as trustee for Whitley's heirs. Her title to the fund evidently was not transmuted by her removal of it from Washington into Tennessee, and it was therefore incumbent upon the Tennessee courts

to respect the title which was vested when it was brought within that state. "Any other rule would destroy all safety in derivative titles," and the refusal of the Tennessee courts to respect the title given by the Washington courts was corrigible by this court. *Green v. Van Buskirk, supra.* Of course the construction placed by the courts of one state upon the statute of another state is not reviewable in this court in the absence of pleading and proof of a settled construction which was ignored (*Louisville & N. R. Co. v. Melton,* 218 U. S., 36), but such a case is not involved. In the Tennessee litigation the source of the fund in controversy and the nature of the administratrix' title thereto was shown, and the question was whether the title to it in Tennessee was to be determined by the laws of Tennessee or the laws of Idaho. The unqualified refusal of the Supreme Court of Tennessee to recognize the title which was vested by the courts of Washington in accordance with the Idaho statute made a case within the jurisdiction of this court.

Howsoever much others may have been guilty of the crime of *lese majeste* against the State of Idaho, defendant has not been, and it protests

against being made a scapegoat for the real criminals.

For the manifest error of the Supreme Court of Idaho in refusing credit to the Washington judgment, we pray a reversal and a remand of the cause with directions for its dismissal.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1914
No. 206

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,

vs.

MARY ELIZABETH WHITLEY, Defendant in Error.

ERROR TO THE SUPREME COURT OF IDAHO

REPLY BRIEF OF PLAINTIFF IN ERROR

(*Note*: We shall follow in this brief the course pursued in the opening brief of referring to the de-

fendant in error as the plaintiff and the plaintiff in error as the defendant.)

Disregarding for the present the inconsequent and the incidental in the brief for plaintiff, two main points are urged in support of the ultimate proposition plaintiff's counsel seek to establish, *viz.*, that plaintiff was not represented in the Washington action, and therefore is not concluded by the judgment rendered therein. These are:

(1) That the Supreme Court of Washington has held that parents of a decedent are not entitled to share in damages recovered for death by wrongful act under the statute of that state. Since the Idaho statute entitled plaintiff to share in the damages recovered for the death of her son, necessarily the recovery in Washington was not on her behalf, as the courts of that state would not have permitted her to share in the recovery.

(2) The plaintiff in the Washington action sued as administratrix under appointment by the courts of Tennessee. The capacity in which she sued, and whom she represented in the suit, were therefore determined by the laws of Tennessee, and

since under those laws the recovery was solely for the benefit of the widow, the mother, plaintiff here, was not represented in the Washington action.

Egregious misconception of the nature and effect of the Washington action and judgment is apparent from the urging of those points. The Washington action and the judgment rendered therein were not based upon a cause of action given or in any way affected by the laws of Washington or the laws of Tennessee. The recovery was entirely upon the cause of action given by the Idaho statute. In her complaint the plaintiff in that action alleged that she was the administratrix of the estate of A. P. Whitley, deceased; that Whitley came to his death in Idaho through the defendant's negligence; and that under the Idaho statute, which was set out *totidem verbis,* she was entitled to recover damages for his death. The complaint does not state where the plaintiff was appointed administratrix, and the statute of Idaho is solely counted upon as giving the cause of action. *Record,* pp. 26-28. The court's findings, which, under the Washington practice, are an essential part of the judgment (see pp. 9-10, opening brief), were of the facts stated in the complaint, and that

> "The laws of the State of Idaho, where said A. P. Whitley met his death, prescribe as follows: 'When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death,' and by virtue thereof the plaintiff herein is entitled to institute this proceeding against defendant to recover the amount due for the death of the said A. P. Whitley."
>
> *Record,* p. 36.

Evidently the Washington action was based, and the judgment therein rendered, solely upon the cause of action which arose in Idaho and was given by the Idaho statute. Quite as evidently it was within the competency of the Washington courts to render judgment upon that cause of action.

> "Statutes have no extra-territorial operation and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought."
>
> *Galveston etc. Co. v. Wallace,* 223 U. S., 481, 490.

No question of conflicting public policy is presented, for the statutes of both states authorize the recovery of damages for death by wrongful act, the only difference being that the word "heirs" in the Idaho statute has been held to include parents, while the same word in the Washington statute has been held not to include them. As the recovery was based upon the Idaho statute, its every incident was governed by that statute, notwithstanding it was secured in the courts of Washington.

> "As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart v. Baltimore & Ohio R. R.,* 168 U. S., 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori,* with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood,* 1 Blackf. (Ind.), 71; *Dennick v. Railroad Co.,* 103 U. S., 11, 18. But as the only source of

> this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith v. Condry,* 1 How., 28, but equally determines its extent."
>
> *Slater v. Railway Company,* 194 U. S., 120, 126.

The right to recover in such a case and the amount of recovery are governed by the *lex loci* and not the *lex fori.*

> *Railway Company v. Babcock,* 154 U. S., 190.

So are questions relating to the manner of distribution and who shall share in it.

> *Dennick v. Railway Company,* 103 U. S., 11.
>
> *Stewart v. Railway Company,* 168 U. S., 445.

A Texas statute did not permit a suit against a receiver for death by wrongful act. Held, that an action might nevertheless be maintained in Texas against a receiver upon a cause of action arising in Louisiana, whose statute permitted such an action.

> *Texas etc. Co. v. Cox,* 145 U. S., 593.

The doctrine of the foregoing cases has not been

relaxed.

Cuba R. Co. v. Crosby, 222 U. S., 473.
Tennessee etc. Co. v. George, 233 U. S., 354.
W. U. Tel. Co. v. Brown, 234 U. S., 542.

Such is the law in Washington, also. In that state employers engaged in hazardous occupations are taxed to create a fund from which the state compensates injured employes, a private right of action by an injured employe to recover damages from his employer being forbidden. Held, nevertheless, that an employe injured by his employer's negligence in Idaho, where the common law rule prevails, could maintain an action in Washington to recover damages from his employer.

> "In all such cases, the right to recover is governed by the *lex loci* and not by the *lex fori.*"

Reynolds v. Day, 79 Wash., 499.

The construction of the death claim statute of Washington, then, may be put aside as a thing of no moment, for it could affect no incident of a recovery under the Idaho statute. The same consideration requires the elimination of the laws of Tennessee. Those laws neither gave the right of action sued upon nor authorized the plaintiff to

sue upon it. The death of plaintiff's intestate occurred in Idaho, and the Idaho statute alone determines the right to recover, who may sue to recover, the amount of recovery, and who shall participate in it. In this case the Supreme Court of Idaho said of the statute: "Except for this statute no such action could be prosecuted in this state and no such cause of action could accrue in this state." *Record,* p. 77. The laws of Tennessee have no extra-territorial effect, of course, and it is nonsense to say they could affect any incident of an action prosecuted in Washington upon a cause of action arising in Idaho and depending for its existence wholly upon an Idaho statute.

It is true, as stated by counsel, that the general rule is that an administrator's interest in and control over an intestate's estate is established and delimited by the law of the place of his appointment. That general rule prevails because ordinarily the function of an administrator is to administer an intestate's estate which is within the jurisdiction of the court appointing him, in accordance with the laws of that jurisdiction. The reason for that rule is not present here, and the rule itself is inapplicable. The cause of action sued

upon in Washington was no part of the estate of A. P. Whitley; it was never subject to the jurisdiction of the courts of Tennessee; and the laws of that state had nothing to do with its administration. The Supreme Court of Idaho fixed the character of that cause of action in the case at bar.

> "The cause of action is not anything that ever belonged to the decedent or to his estate. It never accrued to the decedent. The action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute confers this right of action on the heirs, and it gives it directly to them or a personal representative such as an executor or administrator, and when such representative prosecutes the action, he does so as trustee for the heirs."
>
> *Record,* p. 77.

Of such a cause of action it has been said:

> "As we have seen, the New Jersey statute confers the right of action in cases of this kind on the personal representative of the deceased. He acts, therefore, not by the authority which the probate court gave when it granted him the power to administer the estate of the deceased, but solely by virtue of the authority vested in him by the statute."
>
> *Boulden v. Railway Company* (Pa.), 54 Atl., 906.

The Idaho statute had no extra-territorial effect, of course, but, as the defendant committed a wrong in Idaho which was actionable there, the statute "gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Slater v. Railway Company,* 194 U. S., 126. There is "an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere," and is "not only the ground but the measure of the maximum recovery." *W. U. Tel. Co. v. Brown,* 234 U. S., 547. The obligation followed defendant into Washington because defendant was there. It did not go into Tennessee because defendant was not there, and it could only exist where it was created or the person of the defendant could be found. Clearly, then, the courts and laws of Tennessee had no jurisdiction over the obligation and no voice in its administration.

Then, it may be asked, of what avail was the Tennessee appointment? How could it authorize the administratrix to sue upon the right of action given by the Idaho statute?

The answer is plain. The statutory right of

action is conferred upon whomever the statute designates. "The legislature had this power to confer this right on any heir or representative it saw fit to name or withhold the authority altogether. *Record,* p. 77. The legislature chose to confer it broadly upon the "heirs or personal representatives" of the decedent. Had it chosen it might have restricted the right to sue to residents of Idaho, or to personal representatives appointed by its courts. Not having done so, the court will not "interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state or appointed by its authority." *Dennick v. Railroad Company,* 103 U. S., 11, 19. Following this case, it is universally held that, given such other conditions as are requisite to the maintenance of the action, any personal representative, wheresoever appointed, may maintain it. (See authorities, p. 19, opening brief.)

Briefly, then, the Idaho statute was the sole authority for the plaintiff in the Washington action to maintain it. She owed to the Tennessee appointment nothing—so far as that action was concerned—but the naked official designation "personal representative" which brought her within

the Idaho statute and thus authorized her to sue. She sued "not by the authority which the probate court gave when it granted (her) the power to administer the estate of the deceased, but solely by virtue of the authority vested in (her) by the statute." *Boulden v. Railway Company, supra.*

But it may be argued—necessarily in the light of events subsequent to the recovery—that permitting the Tennessee administratrix to sue rendered it impossible to enforce the Idaho statute and give the recovery to those for whom it was intended. Such an argument must not be ascribed weight by relation. It can be accorded no greater respect now than it would have commanded at the time had the defendant in the Washington action objected to the maintenance of the action by the Tennessee administratrix on the ground that she might take the proceeds of the action into Tennessee, and that the courts of that state, to which she owed allegiance, might not respect the Idaho statute in the distribution. That objection was made in *Dennick v. Railroad Company, supra,* where it was insisted that none but an administrator appointed in New Jersey, where the cause of action arose, could maintain the action. Said

the court:

> "But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute.
>
> * * * The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts would not compel distribution as the law directs."

Holding that a Michigan administratrix might sue in Wisconsin upon a cause of action arising in the latter state, the Supreme Court of Wisconsin said:

> "The suggestion that, because the plaintiff was not appointed such representative in this state, she therefore is not amenable to the courts of this state, and hence might divert the amount recovered without being answerable therefor, is without merit. In that regard it is enough to say that as such personal representative she is answerable to the courts of Michigan, where it may be assumed the

rights of the beneficiary will be protected."

Robertson v. Railway Company, 99 N. W., 433.

A Kentucky administrator was permitted to sue in Indiana under an Indiana statute which made the recovery a trust fund for the widow and children of the decedent.

> "We will not indulge the presumption that the courts of the State of Kentucky would permit a fund created by a sovereign state, charged in its inception with so sacred a trust, to be squandered or diverted from its legitimate objects. The damages recovered in this action must inure to the exclusive benefit of the children of the deceased. The administrator will hold it in trust for them, and they can doubtless enforce the faithful execution of such trust."
>
> *Jeffersonville etc. Co. v. Hendricks, Admr.,* 41 Ind., 48, 74.

Similar expressions are common in the reports, but it is needless to refer to them. It will not be assumed that the courts of one state will be more discerning or more zealous in the protection of legal rights than the courts of another. The case at bar is an unusual one, and by an unusual concatenation of causes either the intent of the Idaho statute will not be carried out or defendant will

be required to pay twice upon a single cause of action. The record suggests that if the Idaho legislature was zealous that the recovery should go to the parties in its contemplation it would have been wiser to have provided that the right of action which the statute gave should only be recovered upon by a personal representative appointed in the jurisdiction where the action was brought, that a bond should be given to protect the beneficiaries, that the court rendering the judgment should distribute the recovery, etc., etc. But that is a question of legislative policy, and if the legislature of Idaho is content that the action may be waged by any personal representative, and that the beneficiaries shall take their chances upon compelling the personal representative to properly distribute the award, the courts cannot interfere.

Under the Washington statute, the heirs have the primary right of action, and when the personal representative sues he must show that his action is authorized by the heirs.

Copeland v. Seattle, 33 Wash., 415.
Koloff v. Railway Company, 71 Wash., 543.

While the ultimate inquiry in the case at bar is what effect would be given the Washington judgment in the courts of Washington, it is necessary in determining that question to remember that the judgment was not rendered upon a cause of action given by the Washington statute. The construction above referred to is peculiar to the courts and statute of Washington. The prevailing construction elsewhere is that heirs and personal representatives are on a parity of right, and either may sue without consent of the other. (See authorities, pp. 16-18, opening brief.) Construing the California statute of that ilk, it was said:

> "In our judgment, but one action is permitted, and that action may be brought either by the heirs of the deceased or by his personal representatives; and, when one action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits. As for instance, when the personal representative of the deceased brings an action to recover damages for the act or neglect causing death, if another action is afterwards brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or, if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second action."
>
> *Munro v. Reclamation Co.*, 24 Pac., 303.

The Idaho courts have never discussed the subject, but as the Idaho code, including the statute in question, is taken very largely from the California code, and upon all such questions the Idaho courts follow the California decisions religiously, it must be accepted that the law of Idaho as to right to sue is correctly stated in the California decision. Since the Supreme Court of Washington said in *Reynolds v. Day, supra,* that all such questions as this are governed by the *lex loci* and not by the *lex fori,* it is apparent that the rule of the *Copeland* and *Koloff Cases* would not be held applicable in an action brought under the Idaho statute.

Assume, however, that the peculiar rule of Washington does control, and that in determining the validity of the judgment it must be regarded in the same light as if it were based upon the Washington statute.

The Idaho courts did not deny effect to the Washington judgment on the theory that jurisdiction to render it was wanting, or that a personal representative appointed in any other state than Idaho could not maintain the action. It was de-

nied effect solely on the theory that because the courts of Tennessee refused to distribute the recovery as prescribed by the Idaho statute, the plaintiff in the Washington action did not represent all the heirs entitled under the Idaho statute; that "an administratrix appointed under the laws of Tennessee does not represent every person there who is made an heir under the laws of Idaho." *Record,* p. 79.

The theory that the courts of Tennessee could fix the capacity of a plaintiff to sue and the nature of the recovery in an action in Washington upon a right of action given by an Idaho statute, by ruling that the recovery was to be distributed in accordance with the laws of Tennessee and not of Idaho, needs no further remark. No question of jurisdiction being involved, and the Washington action having been prosecuted by one authorized by the statute to sue and to represent all the heirs, the sole question is whether she did represent all the heirs. And of that question the effect which would be given the judgment in Washington is conclusive, for it "can have no greater or less or other effect in other courts" that it has where rendered. *Tilt v. Kelsey,* 207 U. S., 57.

The court rendering the judgment intended it should have the effect that it would have had in Idaho for, referring to the Idaho statute, it found that "by virtue thereof the plaintiff herein is entitled to institute this proceeding against defendant to recover the amount due for the death of said A. P. Whitley." *Record,* p. 36. The Supreme Court of Washington holds that the law of the place and not of the forum governs. *Reynolds v. Day, supra.* When a personal representative sues under the Idaho statute, he does so as trustee for the heirs. Necessarily he sues as trustee for all the heirs unless the contrary is made manifest. It follows that the plaintiff in the Washington action must be held to have sued for all the heirs of A. P. Whitley unless the judgment roll in that case, read in the light of the *Copeland* and *Koloff Cases,* establishes that she sued for the benefit of the widow alone.

The doctrine of those cases is that

> "* * * as the widow has the first right to sue, it must be made to appear, at some stage of the proceedings prior to the time the defendant is called on to put in his defense, that the widow has knowledge of, and sanctions the action brought by the personal

> representative, so that she cannot afterwards repudiate his acts and maintain an action in her own name."
>
> *Copeland v. Seattle,* 33 Wash., 421.

As explained in the *Koloff Case* (71 Wash., 550), the word "widow" was used in the above opinion in relation to the facts there presented, and in lieu of the word "heirs" as used in the statute.

The rule, then, is one for the protection of the defendant, to remove the possibility of his being exposed to two actions on account of a single cause of action. It affects neither the jurisdiction of the court or the actual right to recover. Said the court in the *Koloff Case* (p. 553):

> "Since this failure of proof does not go to the actual right of recovery, and since the action was properly brought if actually authorized, we would not be warranted in directing a dismissal. * * * The judgment is therefore reversed, and the cause is remanded for a new trial, or for a dismissal without prejudice, at the respondent's option."

There is, then, only a question of authority involved. If an heir consents to a personal representative suing he is concluded by the judgment rendered in the suit; otherwise not. The author-

ity, of course, may as well be conferred after the act as before. The doctrine of ratification is of universal application whenever the validity of the act of one person assuming to act for another is involved. "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given. * * *" *Cook v. Tullis,* 18 Wall., 332, 338. It is "well settled law that subsequent assent is equivalent to precedent authority * * *." *West v. Chehalis,* 12 Wash., 369, 372.

> "By ratifying the unauthorized act, the principal assumes and adopts it as his own. This adoption extends to the whole of the act; it goes back to its inception, and continues to its legitimate end. The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given."
>
> *Gaffney v. Megrath,* 23 Wash., 476, 493.

An unauthorized contract is ratified when the principal sues upon a covenant contained in it.

Smith v. Morse, 9 Wall., 76.

Though an attorney commences an action without the knowledge or consent of the plaintiff, the unauthorized act may be ratified at any time there-

after.

Dresser v. Wood, 15 Kan., 264.
Hughes County v. Ward, 81 Fed., 314.

Where a sale of realty was made under a consent decree entered upon the stipulation of an attorney who had appeared without authority, a subsequent claim to the proceeds of the sale made by the principal operated as a ratification of the unauthorized appearance by the attorney.

Robb v. Vos, 155 U. S., 13.

The unauthorized acts of an attorney will bind his client if ratified.

Erwin v. Blake, 8 Peters, 18.
Denny v. Parker, 10 Wash., 218.
Lambert v. Gillette, 24 Wash., 726.
Gaffney v. Megrath, 23 Wash., 476.
State etc. v. Spokane, 44 Wash., 688.

An action for a false return cannot be sustained where the defendant, knowing a judgment has been entered against her upon it, contracts with respect to the judgment as though it were valid.

Morgan v. Deposit Company, 66 Wash., 649.

An unauthorized act must be accepted or repudiated *in toto;* the beneficial cannot be accepted and the burdensome repudiated.

Gaines v. Miller, 111 U. S., 395.
Teague v. Maddox, 150 U. S., 128.
State etc. v. Spokane, 44 Wash., 688.

The few citations given above are merely to show that the doctrine of ratification in the Washington courts is the familiar doctrine of ratification of this court. Under it there can be no doubt that the plaintiff in the case at bar ratified the suit of the administratrix in the Washington courts, and that the ratification was equivalent to a precedent authorization. When the money recovered by the administratrix in the Washington action was taken into Tennessee, the mother sought to secure a part of it. Her petition set up the death of A. P. Whitley in Idaho; the death claim statute of Idaho; the appointment of the widow as administratrix; the recovery by the widow as administratrix of $11,000 damages for the death of A. P. Whitley; and that under the statutes of Idaho the mother was an heir and entitled to one-half the amount recovered. *Record,* pp. 42-45. In

her answer the administratrix pleaded, among other things, the Washington recovery (*Record,* p. 49), and to avoid the necessity for proof it was stipulated by the parties, among other things, that the recovery was had in Washington as pleaded, and that in securing it the widow acted in the capacity of administratrix (*Record,* pp. 50-51).

> "One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such act."
>
> *Mechem, Agency,* §151.
>
> "As has been seen, the principal upon being fully informed of the unauthorized act of one assuming to be his agent has the right to elect whether he will ratify such act or not; but when he has once exercised this right the election is final. If therefore he adopts the act, even for a moment, he adopts it forever, and he will not be allowed, at least where the rights of other parties may be affected thereby, to revoke his ratification."
>
> *Ibid,* §169.

When the plaintiff herein instituted the Tennessee suit to recover a moiety of the Washington recovery upon the theory that it was for the benefit of all the heirs of A. P. Whitley under the Idaho statute and that she was one such heir, she

ratified the Washington action, and her failure to recover because the Supreme Court of Tennessee held "that said fund is to be distributed in accordance with the laws of the State of Tennessee, and not the laws of the State of Idaho" (*Record,* p. 54), does not deprive her ratification of effect. A principal cannot withdraw from a ratification because it eventuates to be a bad bargain. As well might he be permitted to withdraw a precedent authorization because it resulted in a loss. And that the unprofitableness in either case was caused by the fraud of the agent cannot affect the rights of third parties.

Under the *Copeland* and *Koloff Cases,* the Washington action needed nothing but the sanction of the mother to make its result conclusive upon her. That, evidently, was supplied by her ratification of its prosecution.

Reference is made to the declaration of the Supreme Court of Idaho that if the widow had prosecuted an action in Idaho under the same circumstances that the Washington action was prosecuted, and had taken the amount recovered into

Tennessee where the mother was denied participation in it, the judgment would not have been a bar to a suit by the mother in Idaho. *Record,* p. 79.

This court is not concerned with the effect which the Supreme Court of Idaho might give to one of its own judgments. The question it is concerned with is the effect which the Washington courts would give to the Washington judgment. That ascertained the courts of Idaho must give it the same effect, however much it may be opposed to their views of policy or law. Though an Idaho statute positively forbade, yet they would be obliged to give the Washington effect to the Washington judgment.

Christmas v. Russell, 5 Wall., 302.

Though the Washington court erred in rendering the judgment; placed, mayhap, an erroneous construction upon the Idaho statute and in consequence rendered an unwarranted judgment, still the courts of Idaho might not deny it effect, for a judgment is conclusive as to all the *media concludendi* and cannot be impeached within or without the state because of mistake of law.

Fauntleroy v. Lum, 210 U. S., 230.

Strictly, the declaration of the Idaho court above referred to does not require the application of the two last cited cases. It was made in illustration of the court's conclusion as to the effect of the Washington judgment, and to point that the mother could not have been represented in the Washington action because the Tennessee laws did not permit the administratrix to represent her; because "an administratrix appointed under the laws of Tennessee does not represent every person there who is made an heir under the laws of Idaho." *Record*, p. 79. That court's opinion as to the construction of the laws of Tennessee, and as to the effect of such laws in controlling actions in Washington, does not conclude this court. Those matters will be determined in the exercise of its independent judgment.

Huntington v. Attrill, 146 U. S., 657.
Hancock Bank v. Farnum, 176 U. S., 640.
Converse v. Hamilton, 224 U. S., 243.

In the exercise of its independent judgment it will not be supposed that this court will hold that the laws of Tennessee could in any way affect the

character of an action in the courts of Washington.

In answer to what is said by counsel concerning the undermining effect upon the policy of Idaho of giving full faith and credit to the Washington judgment, it is only necessary to suggest that the question of the credit to which it is entitled does not depend upon the policy of Idaho, but upon its credit in Washington. Whatever effect it has there must be accorded it in Idaho, however much the policy of the latter state may be opposed thereto.

Christmas v. Russell, supra.
Fauntleroy v. Lum, supra.

Unquestionably the burden is upon defendant to establish that due effect was denied the Washington judgment. Undoubtedly it has sustained that burden.

Given these undeniable facts: (1) A judgment rendered upon a transitory cause of action, (2) by a court possessing jurisdiction of subject matter and parties, (3) at the suit of one authorized to

sue by the statute giving the right of action, the judgment will certainly bar a second suit upon the same cause of action by any person who is in privity with the plaintiff in the first action. So the only ground upon which the judgment can be avoided is that the paintiff in this action was not represented by the plaintiff in the Washington action.

It will not be doubted, we suppose, that it was competent for the Washington court to determine in what capacity the plaintiff there sued, and that its decision upon that question is as conclusive as its decision upon any other question arising in the case. And it decided, in substance, that the plaintiff in the Washington action represented the plaintiff in this action.

The complaint in the Washington action did not state who were the heirs of A. P. Whitley, nor state on whose behalf the action was brought. It did show that he left at least one heir—the widow—and so stated a sufficient cause of action. It was not necessary to the statement of a complete cause of action that the beneficiaries should be designated. Neither was it necessary that this should

be done in order to entitle the beneficiaries to participate in the recovery. It is enough that it appears that there are heirs to whom the recovery will go.

Jeffersonville etc. Co. v. Hendricks, 41 Ind., 48.

Duzan v. Myers (Ind.), 65 N. E., 1046.

Oyster v. Relief Dept. (Neb.), 91 N. W., 699.

Mo. Pac. R. Co. v. Barber (Kan.), 24 Pac., 969.

McGlone v. Railroad Co., 37 N. J. L., 304.

Hamilton v. Motor Co. (N. J.), 52 Atl., 290.

Howard v. Canal Co., 40 Fed., 195.

Harper v. Railroad Co., 36 Fed., 102.

B. & O. R. Co. v. Wightman, 29 Gratt., 431.

Keller v. Railroad Co., 24 How. Prac., 172.

Under the above authorities, then, the mother's rights would have been recognized in the recovery had her name not been mentioned in the case. But it was brought in, and her rights were made a specific issue in the case, by defendant's answer. It alleged the commencement of the present action by the mother in Idaho, and that she was "under and by virtue of the laws of the State of Idaho,

where the plaintiff's cause of action arose, one of the heirs of said A. P. Whitley," and that she "as such heir, is entitled to maintain said suit against this defendant." It alleged further that if the administratrix were permitted to recover, the defendant would be exposed to a second recovery in the mother's suit in Idaho. *Record,* p. 30. The reply, a pleading required under the Washington practice to affirmative matter contained in the answer, *did not deny that the mother was an heir of A. P. Whitley under the Idaho statute and entitled to recover damages for his death.* It merely alleged that plaintiff "as administratrix of the estate of A. P. Whitley, deceased," had "full power and authority under the laws of the State of Idaho" to settle the claim and to recover for the death of A. P. Whitley, and that her recovery "would be a full and complete bar to the recovery of any sum or sums in the said suit brought in the State of Idaho as aforesaid." *Record,* p. 34. Upon the pleadings, then, it stood admitted that the mother was an heir of A. P. Whitley under the laws of Idaho, and that she was entitled to recover damages in the present action for his death *unless a recovery by the administratrix in the*

Washington action barred her suit. Such being the state of the pleadings, the Washington court found that under the Idaho statute the administratrix was entitled in the Washington action "to recover the amount due for the death of the said A. P. Whitley," and that the mother's suit (the present action) "as one of the heirs of A. P. Whitley, deceased," was "not a defense to this action, nor does it entitle the defendant to have the prosecution of this suit * * * stayed until a determination of the Idaho action." *Record,* pp. 36-38.

With the pleadings containing a direct allegation by the defendant that the mother was an heir under the Idaho statute and entitled to recover damages for the death of A. P. Whitley, and an explicit admission by the plaintiff that the mother was an heir, coupled with a plea, made for the purpose of maintaining the action, that the Washington action should proceed, notwithstanding the Idaho action, because the administratrix was authorized by the Idaho statute to recover the damages for Whitley's death and a recovery by her would bar a recovery by the mother, the Washington judgment is only sustainable and explainable

on the ground that it adjudicated that the action was for the benefit of all the heirs, and would therefore bar the mother's suit.

Again. The theory of the law, putting it callously, is that a decedent is worth a certain sum of money to his heirs, be they few or many. When that sum has been paid, all damages for his death are paid. It is clear that in the Washington action the administratrix recovered the whole amount of damages sustained by all the heirs of A. P. Whitley through his death. The mother did not complain in the Tennessee litigation that the recovery was inadequate, but rather proclaimed its adequacy by seeking one-half of it as her share. The courts of Idaho considered in the case at bar that her individual damage was $5500, one-half the Washington recovery. In every way it is affirmed that $11,000 was the full amount of damage sustained by all the heirs of A. P. Whitley, and if it was it is clear that the Washington court considered that it was rendering a judgment for the entire damage done by the death of A. P. Whitley, and, consequently, that it was for the benefit of all his heirs.

Finally, the record in the Washington action requires the conclusive presumption that the administratrix sued for the benefit of all the heirs. This irrespective of the claim just made that there is a direct adjudication that she sued for the benefit of all.

The Idaho statute giving a right of action for wrongful death creates a trust and designates a trustee and *cestuis que trust.* It would be anomalous if the statutory trustee could under any circumstances abnegate his duty as to some of his *cestuis que trust* and sue for the benefit of less than all. If that can be done, it must necessarily be upon distinct avowal that the action is for the benefit of but a portion of the *cestuis que trust,* and a direct adjudication that the recovery is not for all. Nothing of the sort is suggested in the Washington action. The administratrix sued as statutory trustee, without limitation upon the statutory authority, to recover the trust fund the statute created. It is certain she would not be heard to deny her representative character in a suit for an accounting by her *cestui que trust.* If in the action to recover the trust fund she betrayed the interests of her *cestui que trust,* the latter

would not be bound by her action. But if she acted in good faith she represented her *cestui que trust* fully in the action, and under familiar rules of law whatever concluded the trustee concluded equally the *cestui que trust.*

Shaw v. Railway Company, 100 U. S., 75.
Thompson v. Price, 37 Wash., 394.
Carr v. Cohn, 44 Wash., 586.
Lowe v. Lowe, 53 Wash., 50.
Merz v. Mehner, 57 Wash., 324.

The above are cases of ordinary trusts, but the same rule governs where a statutory trustee sues to recover damages for wrongful death.

> "The widow, children, and next of kin are not parties, have no right to be parties, and have no right to compromise or control the action."
>
> *Cleveland etc. Co. v. Osgood* (Ind.), 73 N. E., 285.
>
> "It results from this that neither the beneficiaries of the recovery nor any other person can divest the personal representative of this statutory authority. If the beneficiary of the recovery could by settling the claim oust the personal representative of his jurisdiction, the effect would be that the beneficiary could control the disposition of the action and strip the personal representative of the power

lodged in him by the statute."

Louisville v. Hart's Adm'r. (Ky.), 136 S. W., 212.

"It is he who has the control of the action, and, so long as he faithfully discharges the duties of his trust, he is the only party to represent the interest he prosecutes."

Cincinnati etc. Co. v. Thiebaud, 114 Fed., 918.

Nor will the *cestui que trust* escape conclusion if the peculiar rule in Washington is held applicable, and it is said the suit of the trustee bars the *cestui que trust* only when the latter sanctions the suit. The unequivocal ratification of the Washington action by suing in Tennessee to recover that portion of its proceeds which she claimed to be her due forecloses the *cestui que trust* from now repudiating it.

But it may be argued that the refusal of the trustee to account in the Tennessee action, and her repudiation of the interest of the *cestui que trust,* was an act of bad faith which exempted the *cestui que trust* from binding by her acts.

Wrong doing in a subsequent independent transaction between trustee and *cestui que trust* will not justify the latter in repudiating former right-

ful action by the trustee. In the case at bar the trustee's primary duty was to recover sufficient damages for the death of A. P. Whitley. If she acted in bad faith in that matter her *cestui que trust* would not be bound by her action. But the *cestui que trust* and the courts of Idaho have both affirmed her entire good faith in that matter; the one by striving in Tennessee to get one-half the damages recovered and by being perfectly satisfied with the Idaho judgment for one-half of that sum; the other by measuring her damages in the case at bar at one-half of such damages. With the payment of the sum recovered a second duty arose on the part of the trustee: to account to her *cestui que trust*. This was an entirely independent transaction between trustee and *cestui que trust*, one with which the defendant had no concern, for "the responsibility of making a proper distribution does not rest upon the defendant, but upon the personal representative, the court, or the jury." 8 *Am. & Eng. Enc. of Law* (2d Ed.), p. 955. That the trustee failed in her duty in that transaction is not cause for the *cestui que trust* to repudiate, at the expense of the defendant, the trustee's action in the precedent transaction in which she

did fully protect the interests of her *cestui que trust.*

An inexcusable attempt is made to put the blame for the failure of the mother to secure a portion of the damages recovered for the death of A. P. Whitley upon the defendant. The entire blame therefor, in the final analysis, rests upon the mother herself.

Under legal rules no longer open to discussion, the damages recovered for the death of A. P. Whitley should have been distributed as required by the Idaho statute. The courts of Washington gave judgment upon the *lex loci* and not the *lex fori. Reynolds v. Day, supra.* When the amount of the judgment was paid to the administratrix in Washington, she received it as trustee for the heirs designated by the Idaho statute, and the trust fund did not lose its character through being carried by the trustee into Tennessee. It follows that when the Tennessee courts held that the trustee could repudiate the trust under which she received the fund, and that the laws of Idaho did not govern in its distribution, they violated the

Constitution in several particulars, any one of which secured the mother, the *cestui que trust,* a right of review in this court:

(1) Full faith and credit were denied the laws of Idaho which created the obligation and designated the persons to whom the obligation was due.

(2) Full faith and credit were denied the Washington judgment which by granting judgment to the administratrix upon the Idaho statute fixed her trusteeship and the right of the *cestui que trust* in the proceeds of the judgment.

(3) Due process of law was denied the *cestui que trust* in the refusal to give to her the interest in the trust fund which became vested when it was paid to the trustee in Washington.

That the courts of Tennessee grossly erred in ruling as they did does not acquit the mother of blame for acquiescing in their ruling. The repeated decisions of this court leave no doubt that she would have secured the full interest in the trust fund which she claimed had she sued out a writ of error. Her failure to do so is the proximate cause of her loss.

By innuendo defendant is sought to be charged with some sort of undue interest in the widow's claim and undue disregard of the mother's right. The defendant can be charged with no more than a desire to pay whatever damages it ought to pay to whomsoever was entitled to receive it, and by the payment to whom it would be protected. Defendant was suable in Washington and Idaho. The widow resided in Tennessee, the mother in Texas. The mother had commenced an action against it in Idaho in which the widow would not join, and any judgment which might be rendered therein would not protect it against the widow's claim. True, the widow was made a defendant to the Idaho action, but the Idaho courts had no jurisdiction over her and never obtained any save by the service of process upon her in Washington several years afterward; in 1912. *Record,* p. 16. That service was futile, of course, for it was not a *rem* action and she would not be bound by any judgment based upon constructive service. The defendant could not, therefore, depend upon an adjudication in the Idaho action to finally conclude its liability because a necessary party to such an adjudication, the widow, was lacking.

In the Washington action it conceived there was protection. True, the presence of the other heir, the mother, was lacking there and could not be supplied, for she was a resident of Texas. But the administratrix sued in a representative character, and it would seem if legal rules have permanency that those whom she represented would be bound by the judgment she obtained. To put the matter beyond peradventure defendant set up the mother's right as an heir and the pendency of her action, both of which were admitted but held not to affect the right of the personal representative to recover.

What more ought defendant to have done? It could not bring the mother in because she was a non-resident. It asserted her rights so far as it could. It paid a sum in damages to the person whom the Idaho statute and the Washington court both declared to be her representative which was concededly adequate. It was not its duty, and it would not have been permitted, to interfere in the distribution of the recovery, for its connection with the entire controversy closed with the payment of the judgment. It seems more than hard that because the courts of Tennessee did not recognize the laws of Idaho and Washington and the

protection of the Federal Constitution, and because the plaintiff acquiesced in their disregard, an attempt should not only be made to compel defendant to pay twice, but it should be blamed for a predicament over which it had no control.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914

No. 206

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error

vs.

MARY ELIZABETH WHITLEY, Defendant in Error

ERROR TO THE SUPREME COURT OF IDAHO

BRIEF OF DEFENDANT IN ERROR

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ARGUMENT:

The plaintiff in error maintains that the Supreme Court of Idaho did not accord due faith and credit to a Washington judgment which was pleaded

as a defense. The defendant in error asserts that the Washington judgment was given due faith and credit by the Idaho courts, and that it did not constitute a defense to the cause of action of the defendant in error because:

First, the defendant in error was not a party to nor bound by the Washington judgment;

Second, that the plaintiff in error should not be permitted to plead the Washington judgment in bar because of its own conduct.

FACTS FOUND BY THE IDAHO COURT.

This action was brought by the defendant in error in a proper state court of the State of Idaho to recover damages from the plaintiff in error for causing the death of her son. The son of the defendant in error, A. P. Whitley, was killed in the County of Kootenai, State of Idaho, while a passenger on one of the trains of the plaintiff in error through negligence of the railroad company's employees.

At the time of his death A. P. Whitley left a surviving wife, Josephine Whitley, wh was at the time a resident and citizen of the State of Tennessee. There was no issue of the marriage.

Josephine Whitney, widow of the deceased, in the month of September, 1909, individually entered into an agreement with the plaintiff in error by which the railroad company agreed to pay her $11,000 for causing the death of her husband, and thereupon paid her $1500, with the understanding that she should apply for and receive letters of administration of the estate of her deceased husband in the State of Tennessee, and that upon presenting proof of her appointment she would be paid the balance of $9500. (Record p. 71-72).

Thereafter and on October 2, 1909, the widow was appointed administratrix de bonis non of the estate of A. P. Whitley, deceased (Record p. 40 and p. 72).

Thereupon the Probate Court of Shelby County, Tennessee, the court appointing her, authorized her as administratrix to accept and receive the sum of $11,000 in full settlement of all claims of the estate and heirs of A. P. Whitley, (Finding 5 of Washington court. Record p. 37).

On October 25, 1909, and before the payment of any sum to the administratrix, or of any sum other

than the $1500 paid the wife prior to her appointment as administratrix, the mother of the deceased, the defendant in error, commenced in the District Court of Kootenai County, Idaho, the county wherein the accident happened and the death occured, this action, and joined Josephine Whitley as a party defendant because of the refusal of Josephine Whitley to join as a plaintiff. The railroad company was served with process, but personal service could not be had on Josephine Whitley (Record p. 72).

While the present action was pending, Josephine Whitley was negotiating with the railroad company with a view to completing her settlement and securing payment of the balance due under the agreement made with her. The railroad company refused to settle without an action, and accordingly on November 18, 1909, the suit in Washington was filed, on the same day an answer and reply was filed, the cause was not contested, findings were made and the judgment entered which the plaintiff in error pleaded as a bar in this action. (Record p. 72.

The defendant in error was not made a party to the action in Washington, and no attempt was made to bring her in or make her a party to such action, and

no notice was given her of the pendency thereof (Record p. 72).

The railroad company did plead in the action in Washington the pendency of the action in Idaho and asked that the Washington action be abated pending the determination of the action in Idaho. In the findings in the Washington case, the court held that the plea in abatement was not good and the pendency of the action in Idaho was no ground for the abatement of the action in Washington. (Record p. 73).

The record in the Washington proceedings, found at pages 25 to 38 inclusive, shows that the complaint in the action was filed at 9:10 o'clock A. M. on the 18th of November, 1909, the answer five minutes thereafter; the reply at the same time as the complaint and that the findings of fact were filed at 9:45 o'clock on the same day and judgment at ten o'clock on the same day.

In this case, the trial court found that the Washington case was not contested (Record p. 18); that the judgment was entered in Spokane upon the consent and agreement between Josephine Whitley and the railroad company (Record p. 19), and the Su-

preme Court of the State of Idaho adopted said findings and also found that the cause was not contested (Record p. 72).

These findings are conclusive on this court and cannot be re-examined for any purpose.

German Savings & Loan Society v. Dormitzer, 192 U. S. 125.

Egan v. Hart, 165 U. S. 188.

Josephine Whitley immediately collected her judgment and took the money to the State of Tennessee. Thereupon the defendant in error, Mary Elizabeth Whitley made application to the Probate Court of Shelby County, Tennessee, to have the administratrix pay over to her one-half of the sum received from the railroad company as damages for causing the death of her son on the ground that the said A. P. Whitley died without issue and that under the statutes of Idaho the wife and the sole surviving parent were the heirs entitled to recover for his death. The Probate Court held against Mary Elizabeth Whitley, and the case was appealed to the Supreme Court of Tennessee, and that court by an opinion filed July 14, 1912, affirmed the judgment of the

Probate Court of Shelby County and held that the fund should be distributed according to the laws of Tennessee, and that the surviving wife was the sole heir of A. P. Whitley, deceased, and that Mary Elizabeth Whitley, the mother, had absolutely no interest of any kind or character in said fund and no right to any part of the proceeds of the recovery (Record p. 73).

Thereafter the case at bar was brought to issue; was tried by the court sitting without a jury and judgment entered in favor of Mary Elizabeth Whitley. Appeal was taken to the Supreme Court of Idaho by the railroad company. (Record p. 73).

The railroad company at all times has admitted its negligence in causing the death of A. P. Whitley and its liability therefor. In this case, however, it pleaded the judgment of the Superior Court of Spokane County, Washington as a bar, and also pleaded the judgment of the Tennessee court as a bar, and maintained those defenses through the Idaho courts. It has now abandoned in this court its defense based upon the Tennessee judgment and relies alone upon its defense based upon the Washington judgment.

STATE JUDGMENT IN OTHER STATES:

> "It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter of the parties affected by it, nor into the facts necessary to give such jurisdiction."

Thompson v. Whitman, 18 Wall. 457.
Simmons v. Saul, 138 U. S. 439-448.
Reynolds v. Stockton. 140 U. S. 254-255.

It has also been settled that inquiry can be made to determine whether the judgment so pleaded was so far responsive to the issue tendered by the pleadings as to a proper exercise of jurisdiction on the part of the court rendering it.

Reynolds v. Stockton, 140 U. S. 254-255.

The court in which the judgment of another state is pleaded may inquire into the right of the state where the judgment is rendered to exercise authority over the parties or the subject matter, and no effect is given by either the constitution or the statutes of Congress passed in pursuance thereof to the judgment of a court which had no jurisdiction of the

parties against whom the judgment is pleaded as a bar.

Cole v. Cunningham, 133 U. S. 107.
Huntington v. Attrill, 146 U. S. 657.

So that in this case, under the law as settled by this court, inquiry can be made to determine:

First, whether or not the Washington court had jurisdiction of the defendant in error in the cause, the judgment in which is pleaded as a bar to the rights of the defendant in error;

Second, to determine whether the judgment pleaded was rendered under such circumstances that it is apparent that Mary Elizabeth Whitley was in fact heard on the matter determined;

Third, whether the judgment entered in the Washington case was responsive to fact issue duly tendered.

Before proceeding to the discussion of the question whether or not the defendant in error was a party to or bound by the Washington judgment, let us examine the death statutes, first of Idaho, and then of Washington and the constructions which

have been placed thereupon by the courts of the two states.

THE IDAHO DEATH STATUTE AND THE CONSTRUCTION PUT THEREON BY THE IDAHO SUPREME COURT:

The Idaho death statute is as follows:

> When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the proceeding section, such damages may be given as under all the circumstances of the case may be just."
>
> **2** *Idaho Revised Codes,* **1907,** *Sec.* **4100.**

The Idaho death statute is fully construed in the opinion of the Supreme Court of Idaho in this case, and its construction of its own statute will be recognized and enforced by this court.

The Idaho Supreme Court holds:

First: That the death statute of Idaho author-

ized the prosecution of an action by the heirs or personal representatives of a deceased person against a person wrongfully causing the death of such person, and any judgment obtained in such an action inures to the benefit of the heirs of the decedent, and in no case becomes a part of the assets of the estate of the deceased . (Record p. 77);

Second: The statute confers the right of action on the heirs and it gives it directly to them or to a personal representative such as an executor or administrator, and when such representative prosecutes the action he does so as trustee for the heirs (Record p. 77).

Third: That a personal representative of the decedent cannot maintain such an action without alleging and proving that the decedent has left surviving him an heir and that the complainant must set forth for whose benefit the action is maintained (Record p. 78);

Fourth: That as a general rule actions for death cannot be split up and one action be prosecuted by one heir and another action by another heir, or one action by the personal representative of the deceased

and another action prosecuted by the heirs, provided the question or objection is timely raised in a proper manner (Record p. 74);

Fifth: That the mother, Mary Elizabeth Whitley, was an heir under the laws of the State of Idaho (Record p. 78);

Sixth: That a recovery for death in a foreign state, under the death statute of Idaho, for the use and benefit of persons who are heirs under the law of such foreign jurisdiction is not a bar to the further prosecution of an action in this state, for the use and benefit of such heir, or heirs, under the laws of this state as were not included within the recovery in the foreign jurisdiction (Record p. 78).

THE WASHINGTON DEATH STATUTE AND THE CONSTRUCTION PLACED THEREON BY THE SUPREME COURT OF WASHINGTON

The Washington death statute is as follows:

> "The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and

all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs, or personal representatives may maintain an action for damages against the person causing the death. If the deceased leaves no widow of issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are residents within the United States at the time of his death, may maintain said action. When the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharfs, his heirs or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, as under all circumstances of the case may to them seem just."

1 *Remington v. Ballinger Ann Codes, Sec.* 183.

The Supreme Court of Washington has construed its death statute and its construction will be recognized and enforced by this court. The construction so given is not dissimilar to the construction given the Idaho death statute by the Supreme Court of Idho in this case, except that the Supreme Court of

Washington has held that a parent is not entitled to recover for wrongful death thereunder.

The Washington Supreme Court holds:

First: That under the death statute of Washington, *Sec.* 183 *Remington & Ballinger Codes* creating a right of action for wrongful death, the sole beneficiaries are the decedent's widow and children, and not the parents or collateral heirs.

Noble v. City of Seattle, 19 Wash. 133;
Koloff v. Chicago, M. & P. S. Ry. Co. 71 Wash. 543; 129 Pac. 398.

Second: That the statute grants but one cause of action to be prosecuted in a single suit by the heirs or personal representatives of the decedent.

Riggs v. Northern Pacific Ry Co., 60 Wash. 299;

Third: That where an action is prosecuted in the name of the personal representative, it is not for the benefit of the estate, but for the sole benefit of the widow and children who share jointly in the damages recovered.

Copeland v. City of Seattle, 33 Wash. 615, 74 Pac. 682.

Koloff v. Chicago, M. & P. S. Ry. Co. 139 Pac. 298, 71 Wash. 543.

Fourth: That while it is customary to prosecute such action in the name of the widow and children, it may be prosecuted in the name of the personal representative for their benefit.

Archibald v. Lincoln County, 50 Wash. 55; 96 Pac. 831.

Fifth: That it must be made to appear that the widow has knowledge of and sanctions the action brought by the personal representative, so that she cannot afterwards repudiate his acts and maintain an action in her own name, where the widow is beneficiary, in a case where there was a widow, but no children.

Copeland v. City of Seattle, 33 Wash. 615.

Sixth: That if an authorization or sanction of the suit by the administrator is necessary on the part of the widow, it is also necessary on the part of the other heirs.

Koloff vs. Chicago, M. & P. S. Ry. Co. 71 Wash. 543.

In the case last cited, the Washington Supreme Court said:

"In the Copeland Case, 33 Wash. at page 421, 74 Pac. at page 584 (65 L. R. A. 333) it is said: 'It is true the defendant cannot be subjected to two actions for the one cause, and, as the widow has the first right to sue, it must be made to appear, at some stage of the proceedings prior to the time the defendant is called on to put in his defense, that the widow has knowledge of and sanctions the action brought by the personal representative, so that she cannot afterwards repudiate his acts and maintain an action in her own name. The danger of a defendant's being subject to more than one action is, however, not very real. It is always within the power of the courts to protect a defendant against the possibility of being so subjected, and doubtless they will do so when called on at the proper times.' We adhere to the rule so laid down as salutary and essential to the protection, not only of a defendant, but also of the rights of the widow and children. While it is there assumed that the widow has the first right to sue, this was said in relation to the facts there presented. In that case there were no children but only a widow, and that language was used in reference to the right as between the beneficiaries and the personal representative. The right of recovery being joint and enforceable only in a single action, it follows that the right to sue as to the widow and children is co-ordinate, neither having a prior right as to the other. It also follows that, if an authorization or sanction of the suit by the

administrator is necessary on the part of the widow, it is also necessary on the part of the heirs."

THE DEFENDANT IN ERROR WAS NOT A PARTY TO, NOR BOUND BY THE WASHINGTON JUDGMENT.

Assuming that the principles which have been hereinbefore stated concerning the full faith and credit clause of the Constitution are settled, it becomes essential to inquire into the authority of the Washington court in the case which is pleaded in bar to enter any judgment conclusive upon the rights of the defendant in error, and to determine whether or not the Washington court did enter such judgment. Or, stated in another way, to determine whether or not the defendant in error was a party to or represented in that proceeding.

In the action in the State of Washington, Josephine Whitley did not, either as administratrix under her appointment in Tennessee, or in any other capacity represent the mother, and the Washington judgment entered in that case was not and could not be a bar for these reasons:

First: A conclusive and controlling reason is that under the Washington laws as construed by the Supreme Court of that state. it was essential to a recovery that it should be made to appear at some stage of the proceedings prior to the time the defendant was called on to put in its defense, that the heirs had knowledge of and sanctioned the action brought by the personal representative. In the case of

Copeland v. City of Seattle, 33 Wash. 415

and again in the case of

Koloff v. Chicago, M. & P. S. Ry. Co. 71 Wash. 543, 129 Pac. 398.

the Supreme Court of that state adopted a rule, the effect of which is that defendant has the right to require a personal representative to show that his action is sanctioned by the heirs who are entitled to participate in the recovery, if one be had, and the defendant can, by raising the question at the proper time in that proceeding, protect itself against the possibility of being subjected to more than one action. The Supreme Court of Washington adopted

that rule and has adhered to it because as it stated in the case of

Koloff v. Chicago, M. & P. S. Ry. Co., 71 Wash. 543.

it believed the same to be salutary and essential to the protection, not only of the rights of the defendant, but also of the rights of the heirs.

The complaint filed by Josephine Whitley in the Washington case did not disclose that there were any heirs of said A. P. Whitley, other than herself. The answer of the defendant disclosed that it was aware of the fact that another heir, the mother, was in being, yet the railroad company did not require Josephine Whitley, in accordance with the rule in force in the State of Washington, to set forth that she maintained the action as a personal representative with the authorization or sanction of that other heir. By so insisting, the railroad company could have protected itself against the possibility of two actions, providing such facts could have been made to appear. And failing so to do and avail itself of its defenses, that judgment under the pleadings in that case and under the decisions of the Supreme

Court of Washington, cannot be held to extend as a bar to the rights of Mary Elizabeth Whitley.

The District Court of Kootenai County, Idaho, the court that tried the case at bar, found that the plaintiff in error at the time it pleaded to the complaint in Washington knew that the mother of A. P. Whitley was an heir, but did not require Josephine Whitley as administratrix, in her complaint to set forth who the heirs of said A. P. Whitley were, or for whose benefit the action was being maintained. Also, that the railroad company knew at the time it pleaded to the complaint of Josephine Whitley in Washington that the mother of the deceased claimed to be an heir and claimed to be entitled to compensation for the death of her son. But knowing that, the railroad company did not in any way advise the defendant in error or any one representing her of the commencement of the action in Washington, nor was any notice whatever given to the defendant in error of the suit so commenced in Washington. (Finding 13, District Court, Kootenai County, Record p. 18).

Second: The Washington court did not at any time determine who were the heirs for whom Josephine Whitley was suing, or whom she represented, either as administratrix or trustee, and did not at any time find or hold that she was representing the defendant in error. If anything can be gathered from the pleadings in that case, it is that she represented no heir but herself;

Third: The pleadings in the Washington case disclosed that Josephine Whitley was not acting as trustee for the defendant in error, but was occupying, at the time the suit in Washington was maintained as well as subsequently, a position of hostility to the mother of the deceased, all of which was known at that time to the plaintiff in error.

The railroad company shows by its answer in the Washington case (Record p. 30) that Mary Elizabeth Whitley had already commenced this action against it and Josephine Whitley in the State of Idaho, and in that complaint alleged that Josephine Whitley was joined as a defendant for the reason that she declined to join with the mother as a plaintiff.

Notwithstanding this knowledge on the part of the defendant and the fact that these matters are shown by the pleadings in the Washington case, the railroad company by agreement and consent between it and Josephine Whitley, without availing itself of the defenses which it might have interposed that the defendant in error was not represented, permitted the judgment in Washington to be entered, and now seeks to have it held a bar;

Fourth; Josephine Whitley, as administratrix, had no other or broader powers than were conferred upon her by the laws of the state under which she was acting, to-wit, the laws of the State of Tennessee, and by the laws of that state she was the representative only of the heirs under the succession statute of Tennessee, and the mother under the laws of the State of Tennessee was not an heir. (See decision, Supreme Court of Tennessee, Record p. 52-54).

The Washington judgment pleaded in bar held that Josephine Whitley, as administratrix under the laws of the State of Tennessee and by authority of an order of the Probate Court of Shelby County, Tennessee, was entitled to receive the balance of $11,000

of and from the railroad company. So that whatever right she had to accept said balance and to settle the cause of action under the Washington judgment was based upon authority derived by her from the Probate Court of Tennessee to receive said sum for the estate, and it was by virtue of that order and the authority thereof that even by the Washington consent judgment she was held to have the right to recover. Therefore, even under that judgment, she acted as trustee only under her appointment in Tennessee, under the authority of the Probate Court of Tennessee, for the estate, and was not trustee under the laws of the State of Idaho for heirs other than those recognized in the court of her appointment, and by the pleadings in the action did not declare that she was a trustee for any heir other than herself.

Under the decision of the Supreme Court of Washington in the case of

Koloff v. Chicago, M. & P. S. Ry. Co. 129 Pac. 398, 71 Wash. 543.

had that court been called upon to construe the judgment pleaded in bar it would have held as the Idaho court did that it was only entered for the benefit of

the heir mentioned, the widow, and that it did not bind conclusively the rights of the mother, who did not sanction or authorize the action. It was expressly held by the Supreme Court of Idaho that if Josephine Whitley had come to Idaho and prosecuted her action in the same manner, with the same parties, solely under her appointment from the Tennessee court, and no question of her capacity to sue had been raised, and she had obtained a judgment such as she obtained in the State of Washington and had returned as she did with the fruits of that judgment to Tennessee, such judgment, although rendered and entered in the Idaho jurisdiction, would not be a bar to the prosecution of this present action by Mary Elizabeth Whitley as an heir of A. P. Whitley, deceased, (Record p. 79).

The reason given by the Supreme Court of Idaho was that in prosecuting such action as such administratrix she was not representing all of the heirs who were entitled to recover under the Idaho statute.

Under the Washington decisions which have been cited, the Supreme Court of that state would certainly have announced a similiar rule had the Washing-

ton judgment been under investigation in the courts of that state.

THE CONSTRUCTION GIVEN TO THE WASHINGTON JUDGMENT BY THE SUPREME COURT OF IDAHO:

The Supreme Court of Idaho coming to the consideration of the question of whether or not the Washington judgment was a bar found these facts:

First. It must be remembered that the Washington court never at any time has determined who were the heirs for whom Josephine Whitley was suing, or whom she represented as administratrix and trustee. (Record p. 76).

Second. That while the judgment was entered in Washington, the fund was apparently never subjected to the Washington jurisdiction. The fruits of the Washington judgment, however, were at once subjected to the jurisdiction of the Probate Court of Shelby County, Tennessee (Record p. 76);

Third. The Probate Court of Shelby County, Tennessee, at once held that Josephine Whitley had never represented Mary Elizabeth Whitley and had

never prosecuted an action for her benefit, and that Mary Elizabeth Whitley had no interest whatever in the fund received, and that Josephine Whitley was the sole heir and distributee of the deceased, which judgment was affiirmed by the Supreme Court of Tennessee (Record p. 76).

The Supreme Court of Idaho thereupon determined that it appeared:

First. That Mary Elizabeth Whitley had no right of action and no claim whatever under the laws of the State of Tennessee;

Second. That she was never made a party to the action prosecuted in the State of Washington, and that the action there prosecuted was not prosecuted for or in her interest or on her behalf, and that she was neither accorded representation there in person nor by trustee, administrator or other representative, and therefore, she never had been a party to the Washington judgment and was not bound by it (Record p. 77).

In support of its finding that an action could still be maintained by Mary Elizabeth Whitley, and that

she was not a party to nor bound by the judgment rendered in the State of Washington, the court cites the case of

Galveston H. & A. S. R. Co. v. Kutac, 11 S. W. 127. (72 Texas 643).

In that case the Supreme court of Texas held that where an action was brought by one heir and defendant knew of other heirs, it was his duty to have them join or be subject to suit by the others, and that in an action by surviving children against a railroad company for the death of their mother, plaintiffs were not precluded by the judgment rendered in a suit brought by their father for himself only, upon the same cause of action, to which they were not made parties. In that case the court said

> "While it is true that the statute (Rec. St. art. 2899) authorizing the institution of suits of this character evidently intended that one suit should be brought, and although it has been so construed in several cases, (*Railroad Co. v. LeGierse,* 51 Tex. 199; *Railroad Co. v. Spiker,* 59 Tex. 437), it was not intended by the statute, or the construction of it in the cases mentioned, that a person having a right of action under that statute should be precluded, or his rights in any manner affected, by a judgment to which he was not a party in favor of the defendant, against

one who might also have a right of action with such person. If several persons having the right to sue would be concluded by a judgment to which they were not parties, against one having the right of action with them, the result would be that one would have the power to compromise and destroy the rights of all who could sue in the same action. There is nothing in this inconsistent with the rule that only one suit should be brought under the statute, and it is entirely within the defendant's power to require that only one such suit shall be brought Whereas in the case tried in the district court of Fayette county, it was developed during the trial that the plaintiffs were then living, and were the surviving children of the deceased, and as such entitled to sue, the defendant, if it desired a judgment binding upon them could have required them by a proper plea to be made parties plaintiff. Not having done so, he ought not to be heard now to insist that they are concluded by a judgment rendered in a suit to which they were not parties, and which he could have had them made parties to if he desired them bound by it. We think, therefore, that the plaintiffs in this case were not concluded by the judgment rendered in the suit, in the district court of Fayette county, brought by their father, Joseph Kutac, for himself only, and to which they were not parties; and the court did not err in excluding the evidence offered, nor in refusing the instruction requested on this point."

The plaintiff in error knew at the time it pleaded in the Washington case that there was another

heir, or at least, that the mother was living and claimed to be an heir of the deceased, and yet it did not acquire the plaintiff in the Washington action to set forth for whose benefit the suit was being maintained nor that the mother authorized and authorized it. On the contrary, the railroad company knew and by its pleadings showed that it knew, that the mother did not authorize or sanction the maintenance of the action.

The purpose of the railroad company was to have entered in the unauthorized case in Washington by consent and agreement with Josephine Wittler a judgment which it could plead in bar, or which it thought it could plead in bar, to the action which had already been commenced by the mother against the railroad company and said Josephine Wittler. In other words, the two defendants in the Idaho action had by an agreement between themselves caused to be entered in the State of Washington in a unauthorized case between themselves, a judgment which the plaintiff in error has pleaded as a bar to the maintenance of this action, and to which the plaintiff in error asks that the Idaho court shall accord full faith and credit and hold a bar to the action com-

menced by the mother. This court has declared that:

> "The essential conditions under which the exception of the res judicata becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants."
>
> *Washington A. & G. Packet Co. vs. Sickles,* 24 How. 333-341.
>
> *Reynolds v. Stockton,* 140 U. S. 254.
>
> "It is a settled doctrine, Chief Justice Marshall said, in *Rose v. Himley,* 4 Cranch, 269, * * * * that the effect of every judgment must depend upon the power of the court to render that judgment. * * * *

In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not, in any just sense—if his appearance was entered and judgment confessed by one who had, in fact, at the time, no authority to do either; and, consequently that the court was without jurisdiction to proceed except on legal notice to him, or without his appearance in person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then such law and usage would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attor-

ney, would be invalid as not being in conformity with due process of law."

National Exchange Bank of Tiffin, Ohio, v. Wiley, 195 U. S. 257.

The Court which appointed Josephine Whitley administratrix and the Supreme Court of Tennessee have both held that she did not represent either as administratrix or as trustee Mary Elizabeth Whitley (Record pp. 52, 53 and 54). In the judgment of the Supreme Court of Tennessee, that court held that the mother had absolutely no interest of any kind or character in the fund paid to the administratrix and no right to any part of the recovery in Washington.

The Supreme Court of Idaho holds in this case that the powers of the administratrix are to be determined by the law of the place of appointment, and that Josephine Whitley, suing as a foreign administratrix, was the trustee only of the heirs recognized by the law of the place of her appointment.

Commenting on this consent decree entered in the State of Washington and the judgment of the Supreme Court of Idaho says:

"These judgments, the one from Washington and the other from Tennessee, would clearly not

be a bar in the respective states against any one except one who was a party or privy to such action and then only to the extent of the subject matter and parties involved. Neither one of them adjudges Mary Elizabeth Whitley's right of recovery under the Idaho statute on this death claim, and the Tennessee Court holds in effect that she was never represented by the personal representative, Josephine Whitley, in the Washington action."

The plaintiff in error was content to join with the other defendant in this action and to agree upon a judgment, which should be entered in the State of Washington that it might thereafter plead in bar to this action. It was content that the action should be prosecuted in the name of a foreign administratrix without objection on its part and without ever subjecting herself or the fund recovered to the authority of the courts of Washington.

The defendant in error was not a party to the Washington judgment; she was not represented by Josephine Whitley; she was not declared either to be or not to be an heir, and no provision was made for her.

THE PLAINTIFF IN ERROR SHOULD NOT BE PERMITTED TO PLEAD THE WASHINGTON JUDGMENT IN BAR, BECAUSE OF ITS OWN CONDUCT:

In Harris v. Balk, 198 U. S. 215.

it was held:

> "But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceedings, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan v. Neville,* 74 Pa. 52, and is spoken of in *Chicago, R. I. & P. R. Co. v. Strum,* 174 U. S. 710 * * * although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of

> making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing required this at the hands of the garnishee."

Under the rule announced in the above case, the plaintiff in error should not be permitted to plead such a judgment as a bar, nor to ask that the full faith and credit clause of the Constitution of the United States should be applied thereto in its behalf in view of the circumstances of its entry, and for these reasons:

(1) The railroad company had entered into the original contract with Josephine Whitley in Washington making no provision for protecting itself against any other heir;

(2) It consented to the entry of the judgment in the State of Washington and did not contest that case;

Third. It did not require Josephine Whitley to become an administratrix under the laws of the State of Washington, although under the laws of that state a foreign administratrix as such cannot sue or defend in the courts of that state.

Barlow & Shepherd v. Coggan, 1 Wash. T. 257
In re Goss' Estate, 73 Wash, 330, 132 Pac. 409.

By asserting that the foreign administratrix had no right to sue, the plaintiff in error could have successfully defended the action against her in that capacity;

Fourth. The railroad company, the plaintiff in error, did not require this foreign administratrix, with whom it was agreeing to a judgment, to set forth for what heirs the action was maintained or for whose benefit it was being prosecuted, nor to set forth that it was being maintained with the sanction and by the authority of the mother, whom the railroad company knew at the time was an heir.

Koloff v. Chicago, M. & P. S. Ry. Co. (Wash) 129 Pac. 398, 71 Wash. 543.
Decision Supreme Court in this case, Record p. 78.
Serenson v. Ry. Co. 45 Fed. 407.
Jones v. Leonardt, 101 Pac. 811.

Fifth. The railroad company did not give any notice whatever to Mary Elizabeth Whitley nor make any effort to have her brought into the case in

Washington or protected by the judgment entered there.

The plaintiff in error does not deny that the case in Washington was an uncontested case, contenting itself by saying in its brief on page 44 that it made no defense to the merits of the action because there was none, and further, that it deemed that it would be protected in the face of the conflicting demands of the widow and mother if it paid that person whom a court of competent jurisdiction held entitled to receive payment.

There was never an attempt to have a court of competent jurisdiction pass upon the question as to whom was entitled to receive payment for the reasons which have been hereinbefore pointed out, but on the contrary, the railroad company and Josephine Whitley, the two defendants in the case in Idaho, for the purpose of foreclosing the rights of the mother and protecting the railroad company against her demands, between themselves agreed upon who was a competent person and what court was a competent court, and thereupon presented the findings in an uncontested case to a judge for his signature.

In the Washington case, the railroad company pleaded the pendency of this case in abatement when it knew or must have known that the pendency of the Idaho action was not a good plea in abatement to the maintenance of an action in some other jurisdiction even though contested. It did not, however, avail itself of the defense which would have protected it against double liability.

NATURE OF THE CAUSE OF ACTION NOT CHANGED BY RECOVERING JUDGMENT UPON IT:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merely in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

Wisconsin v. Pelican Insurance Co. 127 U. S. 265.

Huntington v. Attrill, 146 U. S. 657.

The judgment in Washington, procured as it has been, is of no more efficacy as a defense to the maintenance of this action than would be a receipt signed by Josephine Whitley as administratrix de bonis non appointed by a probate court of Tennessee. The essential nature and real foundation of the defense was not changed by merging the agreement of Josephine Whitley into a judgment. The theory upon which the payment to an administrator releases the defendant is that the administrator was authorized by the heirs to accept the same or to maintain the suit and is not based upon any authority attaching to the office of administrator.

THE AUTHORITY OF THE ADMINISTRATRIX:

Josephine Whitley could not have represented in the Washington action Mary Elizabeth Whitley, the mother, except by her consent and with her authorization. She did not represent her by virtue of her appointment. The jurisdiction of each state is sovereign and independent in granting letters of administration. An administrator derives his title and powers solely from the laws of the place of his ap-

pointment, and it is entirely to that authority from which his rights are derived that he is in any manner accountable. The interest of an administrator is only that which the law of his appointment enjoins.

Hill v. Tucker, 15 How. 458.

Limekiller v. Hannibal & St. Joseph R. Co. 33 Kansas, 83.

It was held by the Supreme Court of Tennesee, in connection with this particular settlement, that Josephine Whitley represented only the heirs under the laws of Tennessee and not the heirs under the laws of the State of Idaho. The Probate Court of Tennessee which made the order authorizing her to settle with the railroad company gave to her no power as administratrix beyond the powers conferred by the laws of the State of Tennessee.

A death statute cannot be construed to authorize a foreign administrator to sue on the theory that he sues, not as an administrator, but as the trustee of an express trust in the amount recovered.

Hall v. Southern Ry. Co. (N. C.) 59 S. E. 879.

As has been pointed out above, under the laws of the State of Washington, the foreign administratrix could not sue in her representative capacity.

In re Goss Estate, 73 Wash. 330, 132 Pac. 409.

So that Josephine Whitley, in the capacity in

which she dealt with the plaintiff in error in the action in Washington, was not a trustee or a representative of the defendant in error. The court of Washington which entered the judgment which has been pleaded in bar made no finding one way or the other upon that question. The Supreme Court of Tennessee, construing its own statutes, has expressly held that she was not a trustee for Mary Elizabeth Whitley. The Supreme Court of Idaho, construing its statutes and the judgment of the Washington court, has held that she was not a trustee for Mary Elizabeth Whitley.

FOREIGN JUDGMENT WILL NOT BE ENFORCED WHEN OVERRIDING HOME POLICY:

A foreign law will not be admitted for the purpose of over-riding any rule of distinctive domestic policy, and the same principle is necessarily applicable to judgments, since otherwise all that would be necessary to force a repugnant law upon the state would be to formulate it in the shape of a judgment.

Wharton on the Conflict of Laws, Sec. 656.

If to the decision of the court of Washington the weight and broad effect can be given that

is asked for by the plaintiff in error, then it should not be enforced in the State of Idaho for the reason that the effect of that decision has been to disregard the laws and policies of the State of Idaho,.

That judgment which Josephine Whitley and the railroad company prepared in the State of Washington made no provision for the protection of the mother's interest in the fund, and the court to which the fund was turned over held that the mother had no interest in it. The result of the entire proceeding was to over-ride and disregard the policy of the law of the State of Idaho; to attempt to distribute a fund paid to a foreign administratrix pursuant to the agreement between the railroad company and the widow, without regard to the rights of another heir.

The brief of the plaintiff in error announces that it is regrettable, no doubt, that in the litigation over the damages received for the death of A. P. Whitley, the Tennessee courts should not have distributed the same according to the statutes of the State of Idaho; and announces that when rights in personalty have been fixed, they are not affected by the removal of

the parties and the property to another state, whatever the laws of the latter state. But the rights in this personalty of $11,000 were not fixed by the judgment consented and agreed to between the railroad company and Josephine Whitley. The courts of Washington did not declare who were the *cestuis que trustent* of the said fund. The pleadings and judgment do not show any sanction to the maintenance of the action for the use or benefit of the mother.

To hold that the defendant in error has been debarred by the proceedings in the State of Washington from maintaining her action, is to hold that the policy of the laws of the State of Idaho may be evaded by fiction, avoided by agreements and stipulations between one heir and the negligent railroad company, and the other heirs excluded or compelled to go to some distant state and there hazard their rights upon the action that the courts of that state may take with regard to the fund. To so hold is to defeat the purpose of the death statute of the State of Idaho. The railroad company would be in a position to bargain with one heir against the others to its advantage, simply requiring that that heir should secure the appointment as administrator under some juris-

diction or caution without regard to the rights of the heirs.

THE EFFECT OF THE DAHLIO JUDGMENT

To sustain the conclusions of the Supreme Court of Idaho and to deny to the Washington judgment the effect of a bar, is not creating any risk of double recoveries against the persons liable under the death statute. Where the person or corporation responsible in damages for the death proceeds in good faith and avails itself of the opportunities of defense it can procure to be settled in one action the rights of all of the parties. It can, at least, give to the heirs who are already urging their rights, notice and an opportunity to be present and be heard.

On the other hand, to hold the Washington judgment a bar is to permit an administrator or administratrix to be appointed in any state in the Union and at all times to subject some of the heirs, who are entitled to participate in a recovery, to the risk of not securing the compensation which the death statute, under which the action is maintained, gives them.

To permit a foreign administrator, without subjecting himself or the fund recovered by him to the

control of the court in which the action is pending, to secure moneys which may be taken to a distant state and distributed, is to cause repetition of exactly what has happened in this case, namely, for a person liable under the death statute to deal to its advantage with one heir in disregard of the rights of all other heirs, even when that person liable under the death statute, has knowledge of such other heirs.

The burden rests upon the plaintiff in error to establish that the judgment in the State of Washington was not given the due effect to which it was entitled.

Commercial Pub. Co. v. Beckwith, 188 U. S. 567.

This we urge for the many reasons stated in the brief, and perhaps more tersely stated in the decision of the Supreme Court of Idaho, it has failed to sustain.

To hold that the Washington judgment is a bar will be to deny to the defendant in error a right given her by the statutes of the State of Idaho without ever having had her day in court.

Respectfully submitted,

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